NLC NATIONAL LEAGUE OF CITIES
CITIES STRONG TOGETHER

February 9, 2018

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, and Broadband Deployment Advisory Committee, GN Docket No. 17-83

Dear Ms. Dortch:

On February 7, 2018, the undersigned, along with Councilmember Larry Kitchens of Hurst, Texas, Snapper Carr and Monty Wynn of the Texas Municipal League, Rick Schuettler of the Pennsylvania Municipal League, and Erik Sartorius of the League of Kansas Municipalities met with the following representatives of the Wireless Competition Bureau and Wireless Telecommunication Bureaus: Lisa Hone, Daniel Kahn, Brian Hurley, Patrick Sun, Darrel Pae, Garnet Hanly, Debora Salons, Paul D'Ari, Adam Copeland, Kate Matraves, David Sieradzki, and Jiaming Shang, to discuss the above-referenced proceedings.

During the meeting, we discussed procedural matters relating to the formation and administration of the Broadband Deployment Advisory Committee, as well as the policy outcomes we hoped to see from the pending wireless rulemaking and how broadband can be made accessible to residents of all income levels in all communities. We urged the Commission again to expand municipal representation on the Broadband Deployment Advisory Committee, as well as its working groups, particularly the State Model Code Working Group, which lacks municipal representation.

We also discussed the interplay between current and pending state legislation focused on small cell deployment, and any potential federal rulemaking. For example, the Texas legislature recently passed a bill that reversed the negotiations many cities had finalized with wireless providers and infrastructure companies,

removing the power of cities to reach mutually beneficial agreements with providers servicing their communities. Both Texas and Kansas are also preempted by state legislation from requiring collocation of equipment, increasing the crowding of vertical structures in city rights of way. Similarly, state law limits cities' ability to incentivize providers to build in underserved neighborhoods, rather than only the most profitable corridors.

We appreciate the staff time and attention paid to these issues, and have attached the following resources for additional reference:

- Small cell facilities siting ordinances from the Maryland municipalities of Bowie, Brunswick, Middletown and Westminster;
- Model ordinance from the Illinois Municipal League;
- Model agreement from the Michigan Grand Valley Metro Council's DAS Consortium; and
- Petition for Injunctive Relief from Texas SB 1004 from a number of Texas municipalities.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's Rules. Please contact the undersigned if you have any questions.

Sincerely,

/s/Angelina Panettieri
Principal Associate, Technology and Communications
National League of Cities

Cc:

Brian Hurley
Paul D'Ari
Elizabeth Mumaw
Richard Lerner

obtained without substantial practical difficulty or hardship to the owner or developer of such property. (Sec. 22-47 amended by O-7-02, adopted 8/1/02, effective 9/3/02).

Sec. 22-48. Planting of trees.

The developer shall be required to plant trees within the limits of the permit area and shall be responsible for all costs associated with such plantings. Planting shall conform to the approved standards as adopted by the Council.

Sec. 22-49. Street lights; specifications.

(a) The developer shall provide and install street lights ready for the service within the permit area when underground electrical distribution service is being provided, and shall be responsible for the cost thereof.

(b) Street lights shall be provided in sufficient quantity to provide adequate illumination in accordance with light level standards established by the Illuminating Engineering Society and approved by the American Standards Association and the General Specifications and Standards for Highway and Street Construction, for the City, as amended from time to time.

(c) Plans showing the location, size, spacing and type of street lights shall be drawn to scale and submitted to the City Manager for review and approval in accordance with this Code. The developer shall exercise special care to ensure that sufficient illumination is provided consistent with tree planting required under Sections 22-48 and all references therein.

(d) Close coordination between developer and the electrical utility company providing service will be required. Such coordination shall be the responsibility of the developer.

(e) Approval and acceptance of street lights and luminaries, provided and installed by the developer shall be in accordance with this Article.

(f) The City Manager may waive, in writing, the required standard of illumination on residential streets where the developer or resident of the area so request and there is a showing that the variation from the standards will have no harmful effect on pedestrian or automobile traffic in the neighborhood.

Sec. 22-50. Hiker-biker trails.

The developer may be required by the City Manager, upon approval of the Council, to provide hiker-biker trails with appropriate ramps within the limits of the permit area. Hiker-biker trails shall conform to the approved standards contained in the design-construction standards adopted by the Council.

Sec. 22-51. Cooperation with cable television franchisee(s).

Every applicant for a road permit hereunder shall be required to cooperate with the holders of any cable television franchise in the City. The applicant shall notify such franchisee(s) of the proposed new construction and allow the franchisee an opportunity to install cable in conjunction with the construction of the road, at the franchisee(s) expense. No street cuts will be permitted by the City for the purpose of installing cable once the street has been accepted by the City

Sec. 22-52. Cul-de-sacs.

Cul-de-sac roadways shall be constructed with a length no greater than nine hundred (900) feet. Islands shall be prohibited in the center of cul-de-sacs. (Sec. 22-1 through 22-52 amended by O-12-90, 5/14/90, effective 6/13/90).

Division 3. Wireless facilities and support structures.

Sec. 22-53. Application for permit.

(a) The installation of wireless facilities and support structures in a City right-of-way shall require a permit under this chapter. No permit shall be issued with respect to the installation of wireless facilities or support structures in, on or over any City street, sidewalk, or right-of-way unless and until the permit applicant and the City have negotiated and executed a franchise or right-of-way use agreement setting forth the terms and conditions, including fair compensation to the City, for applicants' use of City right-of-way, and where applicable, lease payments for the use of any city-owned poles or facilities.

(b) In addition to the other information required by this article, an application for such a permit shall submit the following information pertaining to particular sites or a proposed deployment:

1. A technical description of the proposed facilities, along with detailed diagrams accurately depicting all proposed facilities and support structures;

2. A detailed deployment plan describing construction planned for the 12-month period following the issuance of the permit, and a description of the completed deployment;

3. An engineering certification relating to the proposed construction;

4. A statement describing the applicant's intentions with respect to collocation;

5. A statement demonstrating the permittee's duty to comply with applicable safety standards for the proposed activities in the City rights-of-way;

6. In the case of a proposed attachment to a city-owned facility located in the City rights-of-way, an executed attachment agreement with the city;

7. In the case of a proposed attachment to an investor-owned utility pole in the rights-of-way, an executed attachment agreement with the utility pole owner; and

8. Such other information as the City Manager may require.

(c) The applicant shall pay a processing fee to the City at the time any application to install wireless facilities in a public right-of-way is made, in addition to any other fees required by this chapter or by this code generally, in an amount to be set by the City Council in the City's annual budget.

Sec. 22-54. Requirements and findings.

(a) Wireless facilities and support structures proposed to be located on streets, sidewalks or other rights-of-way in the City shall meet the following requirements:

1. Absent a special finding by the City Manager;

a. Wireless facilities may only be installed on existing utility poles or light poles; and

b. Only entities authorized by the Maryland Public Service Commission pursuant to MD. Code Ann., Public Utilities Art., §§ 5-410, 8-103, as amended from time to time, may erect new poles in the City's right-of-way, and only then for the purpose of supporting telephone lines to provide telephone service.

2. Any new, pole including a replacement pole, installed in City rights-of-way to support wireless facilities shall;

a. Comply with all structural and safety standards specified by the City Manager;

b. Not obstruct pedestrian or vehicular traffic flow or sight lines;

c. Not exceed the average height of the existing street light poles or utility poles within the area extending one thousand (1,000) feet in any direction of the proposed structure;

d. Shall be designed to accommodate the collocation of at least three (3) different wireless providers' antennas and related equipment;

e. If metal, be treated or painted with non-reflective paint, and in a way to conform to or blend into the surroundings; and

f. Comply with such other requirements and conditions as the City Manager may conclude are appropriate to impose.

3. Any wireless facilities installed on a pole or any other structure in the rights-of-way shall:

a. Have equipment box or boxes no greater in collective size than 17 cubic feet in volume with no one side/dimension exceeding four and ¼ (4.25) feet;

b. Have panel antennas no greater than two (2) feet in height, and omni/dome antennas no greater than four (4) feet in height and no wider than three (3) feet in diameter;

c. Have no more than three (3) panel antennas per pole, and no more than one omni/dome antennas per pole;

d. Have microwave dishes no greater than two (2) feet in diameter, with no more than 3 microwave dishes per pole;

e. Be located and designed, including materials, color, and texture, so as to minimize visual impact on surrounding properties and as seen from the streets and sidewalks; and

f. Comply with such other requirements and conditions as the City Manager may conclude are appropriate to impose.

(b) Wireless facilities and support structures proposed to be located on streets, sidewalks or other rights-of-way in the City may be permitted upon a finding by the City Manager that:

1. The application complies with all standards and requirements set forth in Section 22-54(a);

2. The location selected in the application is not in an area where there is an over-concentration of poles or other facilities in, on or over the streets, sidewalks or other rights-of-way;

3. The location selected, and scale and appearance of the wireless facilities and support structures to be installed, are consistent with the general character of the neighborhood;

4. The applicant has agreed to and provided adequate insurance, bonding and indemnification to protect the City and its residents from injury or liability relating to or arising from the proposed facilities and structures;

5. The applicant has entered into the franchise or right-of-way use agreement with the City required by Section 22-53(a); and

6. The wireless facilities, if located in a residential area, do not generate any noise.

Sec. 22-55. Exceptions.

No permit shall be issued with respect to any City street, sidewalk, or right-of-way where, in the judgement of the City Manager, sufficient capacity no longer exists for additional facilities to be placed in the proposed location without jeopardizing the physical integrity of utilities or other facilities already present in the proposed location, or the safe and efficient vehicular or pedestrian use of the street, sidewalk, or right-of-way.

(Division 3, Sec. 22-53, 22-54 & 22-55 added by O-6-16, adopted 11/21/16, effective 12/21/16)

CITY OF BRUNSWICKK
FREDERICK COUNTY, MARYLAND

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF BRUNSWICK, FREDERICK COUNTY, MARYLAND; PROVIDING FOR THE AMENDMENT OF THE CODE OF ORDINANCES OF THE CITY OF BRUNSWICK; PROVIDING FOR PURPOSES AND FINDINGS OF FACT RELATED TO THE ADOPTION OF THE AMENDMENT; PROVIDING FOR DEFINITIONS; ESTABLISHING CERTAIN GENERAL AND SPECIFIC STANDARDS RELATING TO THE LOCATION, PLACEMENT, CONSTRUCTION AND MAINTENANCE OF COMMUNICATIONS TOWERS AND COMMUNICATIONS ANTENNAS; PROVIDING FURTHER FOR THE REGULATION OF SUCH FACILITIES WITHIN THE PUBLIC RIGHTS-OF-WAY AND OUTSIDE THE PUBLIC RIGHTS-OF-WAY; PROVIDING FOR THE ENFORCEMENT OF SAID REGULATIONS; AND PROVIDING FOR AN EFFECTIVE DATE.

NOW THEREFORE, be it, and it is hereby ORDAINED by the City Council of the City of Brunswick, Frederick County, State of Maryland, and it is hereby ENACTED and ORDAINED by authority of same as follows:

SECTION I. Purposes and Findings of Fact

A. Purposes and Findings of Fact.

(1) The purpose of this section is to establish uniform standards for the siting, design, permitting, maintenance, and use of Communications Facilities in the City of Brunswick (referred to herein as the "City"). While the City recognizes the importance of Communications Facilities in providing high quality communications service to its residents and businesses, the City also recognizes that it has an obligation to promote public safety and to minimize the adverse visual effects of such facilities, especially in historic areas, through the standards set forth in the following provisions.

(2) By enacting these provisions, the City intends to:

a. Accommodate the need for Communications Facilities while regulating their location and number so as to ensure the provision of necessary services;

b. Provide for the managed development of Communications Facilities in a manner that enhances the benefits of wireless communication and accommodates the needs

of both City residents and wireless carriers in accordance with federal and state laws and regulations;

c. Establish procedures for the design, siting, construction, installation, maintenance and removal of both Communications Towers and Communications Antennas in the City, including facilities both inside and outside the public rights-of-way;

d. Address new wireless technologies, including but not limited to, distributed antenna systems, data collection units, and other Communications Facilities;

e. Minimize the adverse visual effects and the number of such facilities through proper design, siting, screening, material, color and finish, and by requiring that competing providers of communications services co-locate their Communications Antennas and related equipment on existing towers or infrastructure;

f. Protect and preserve historically significant structures and properties located in the City; and

g. Promote the health, safety and welfare of the City's residents.

SECTION II: Repealer of Certain Communications Facilities Provisions

The terms, conditions, and provisions of Section 4-1403, *Definitions*, are hereby repealed and replaced with a new Section 4-1403 entitled and provided for as follows:

Section 4-1403. Definitions

1. *Antenna* — any system of wires, rods, discs, panels, flat panels, dishes, whips, or other similar devices used for the transmission or reception of wireless signals. An antenna may include an omnidirectional antenna (rod), directional antenna (panel), parabolic antenna (disc) or any other wireless antenna.

2. *Co-location*— the mounting of one or more Communications Antennas on an existing Communications Tower, or on any structure that has been approved by the City to support at least one Communications Antenna.

3. *Communications Applicant (Applicant)*—any entity or person that applies for a Communications Facility building permit, zoning approval and/or permission to use the public right-of-way, City-owned land, or other property for the placement, modification, construction, or siting of wireless Communications Facilities.

4. *Communications Facility* - the antennas, nodes, control boxes, towers, poles, conduits, ducts, pedestals, electronics and other equipment used for the purpose of transmitting, receiving, distributing, providing, or accommodating wireless communications services.

5. *Communications Antenna* - A structure used for transmitting or retransmitting electronic signals, which does not meet the definition of a "standard antenna." Communications Antennas shall include, but are not limited to, antennas used for cellular telephone communications.

6. *Communications Tower* - Any structure, other than a building, that is constructed for the primary purpose of supporting one or more Communications Antennas, including, but not limited to, self-supporting lattice towers, guy towers and monopoles.

7. *Emergency*—a condition that (1) constitutes a clear and immediate danger to the health, welfare, or safety of the public, or (2) has caused or is likely to cause facilities in the rights-of-way to be unusable and result in loss of the services provided.

8. *Essential services* –Uses that are necessary for the preservation of the public health and safety and that are routine, customary and appropriate to the character of the area in which they are to be located. See standards in § 560-24. Essential services shall not include a central sewage treatment plant, a solid waste disposal area or facility, commercial Communications Antennas, commercial Communications Towers, a power-generating station, septic or sludge disposal, offices, storage of trucks or equipment or bulk storage of materials.

9. *FCC*—Federal Communications Commission.

10. *Related equipment or base station*— any structure or equipment at a fixed location, not including a tower, that enables FCC-licensed communications between a user and a wireless network.

11. *Special Use Permit* – the official document or permit by which an Applicant is allowed to construct and use Communications Facilities as granted or issued by the Mayor and Council of Brunswick.

12. *State*—the State of Maryland.

13. *Stealth Technology*—camouflaging methods applied to wireless Communications Facilities which render them more visually appealing or blend the proposed facility into the existing structure or visual backdrop in such a manner as to render it minimally visible to the casual observer. Such methods include, but are not limited to, alternative mounting structures, such as architecturally screened roof-mounted antennas, building-mounted antennas painted to match the existing structure and facilities constructed to resemble trees, shrubs, flagpoles, and light poles.

14. *Substantially Change or Substantial Change* - A Modification to an existing wireless Communications Facility Substantially Changes the physical dimensions of a tower or base station if it meets any of the following criteria: (1) for Tower-Based WCFs outside the public rights-of-way, it increases the height of the facility by more than 10%, or by the

height of one additional antenna array with separation from the nearest existing antenna, not to exceed 20 feet, whichever is greater; for Tower-Based WCFs in the rights-of-way, it increases the height of the facility by more than 10% or 10 feet, whichever is greater; (2) for Tower-Based WCFs outside the public rights-of-way, it protrudes from the edge of the WCF by more than 20 feet, or more than the width of the Tower structures are the level of the appurtenance, whichever is greater; for those Tower-Based WCFs in the public rights-of-way, it protrudes from the edge of the structure by more than 6 feet; (3) it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed 4 cabinets; (4) it entails any excavation of deployment outside the current site of the Tower-Based WCF; or (5) it does not comply with conditions associated with prior approval of construction or Modification of the Tower-Based WCF unless the non-compliance is due to an increase in height, increase in width, or addition of cabinets.

15. *Wireless Communications Facility Applicant (WCF Applicant)*—any entity that applies for a wireless communication facility building permit, zoning approval and/or permission to use the public right-of-way (ROW) or other City-owned land or property.

16. *Wireless Support Structure*—a freestanding structure, such as a Communications Tower or any other support structure that could support the placement or installation of a wireless Communications Facility if approved by the City.

SECTION III: Adoption of New Communications Facilities Provisions

The terms, conditions and provisions of Sections 4-1404 through 4-1429 are hereby repealed in their entirety.

SECTION IV: Adoption of New Communications Facilities Provisions

The following terms, conditions and provisions are hereby adopted and incorporated into the City of Brunswick Zoning Code:

Title 4. Requirements and Standards for Communications Facilities

Section 4-1404. General and specific requirements for Communications Antennas. The following regulations shall apply to all Communications Antennas, except those operated by a federally licensed amateur radio operator:

(A) Standard of care. All Communications Antennas shall be designed, constructed, operated, maintained, repaired, modified and removed in strict compliance with all current applicable technical, safety and safety-related codes, including but not limited to the most recent editions of the Maryland Building Performance Standards, American National Standards Institute (ANSI) Code, and National Electrical Code. Communications Antennas shall at all times be kept and maintained in good condition, order, and repair by qualified maintenance and

construction personnel, so that the same shall not endanger the life of any person or any property in the City.

(B) Permitted in all zoning districts. Communications Antennas are permitted pursuant to this zoning ordinance in all zoning districts throughout the City, so long as they comply with all of the terms and conditions of this Zoning Ordinance and the Code of Ordinances.

(C) Historic areas. To the extent permitted by state and federal law, no Communications Antenna may be located upon any property, or on a building or structure that is listed on either the National or Maryland Registers of Historic Places (either inside or outside the public rights-of-way), or that is deemed by the City to be of specific historical significance.

(D) Wind. Communications Antennas structures shall be designed to withstand the effects of wind gusts to the standard designed by the American National Standards Institute as prepared by the engineering departments of the Electronics Industry Association, and Telecommunications Industry Association (ANSI/TIA-222, as amended).

(E) Aviation safety. Communications Antennas shall comply with all federal and state laws and regulations concerning aviation safety.

(F) Public safety communications and other communications services. Communications Antennas shall not interfere with public safety communications or the reception of broadband, television, radio or other communication services enjoyed by occupants of nearby properties.

(G) Radio frequency emissions. A Communications Antenna shall not, by itself or in conjunction with other antennas and/or Communications Towers, generate radio frequency emissions in excess of the standards and regulations of the FCC, including but not limited to, the FCC Office of Engineering Technology Bulletin 65 entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radio Frequency Electromagnetic Fields," as amended.

(H) Removal. In the event that use of a Communications Antenna is discontinued, the owner shall provide written notice to the City of its intent to discontinue use and the date when the use shall be discontinued. Unused or abandoned Communications Antennas, or portions of Communications Antennas, shall be removed as follows:

(1) All abandoned or unused Communications Antennas and related equipment shall be removed within two (2) months of the cessation of operations at the site unless a time extension is approved by the City.

(2) If the Communications Antenna or related equipment is not removed within two (2) months of the cessation of operations at a site, or within any longer

period approved by the City, the Communications Antenna and/or related equipment may be removed by the City. As security, the City reserves the right to the salvage value of any removed Communications Antenna and/or related equipment, if such Communications Antenna and/or related equipment are not removed by the owner within the specific timeframe enumerated in this Chapter.

(I) Indemnification. Each person that owns or operates a Communications Antenna shall, at its sole cost and expense, indemnify, defend and hold harmless the City, its elected and appointed officials, employees and agents, at all times against any and all claims for personal injury, including death, and property damage arising in whole or in part from, caused by or connected with any act or omission of the person, its officers, agents, employees or contractors arising out of, but not limited to, the construction, installation, operation, maintenance or removal of the Communications Antenna. Each person that owns or operates a Communications Antenna shall defend any actions or proceedings against the City in which it is claimed that personal injury, including death, or property damage was caused by the construction, installation, operation, maintenance or removal of a Communications Antenna. The obligation to indemnify, hold harmless and defend shall include, but not be limited to, the obligation to pay judgments, injuries, liabilities, damages, reasonable attorneys' fees, reasonable expert fees, court costs and all other costs of indemnification.

(J) Maintenance. To the extent permitted by law, the following maintenance requirements shall apply:

(1) The Communications Antenna shall be fully automated and unattended on a daily basis and shall be visited only for maintenance or emergency repair.

(2) Such maintenance shall be performed to ensure the upkeep of the facility in order to promote the safety and security of the City's residents.

(3) All maintenance activities shall utilize nothing less than the best available technology for preventing failures and accidents.

(K) Removal, Replacement and Modification.

(1) To the extent permitted by law, the removal and replacement of Communications Antennas and/or related equipment for the purpose of upgrading or repairing the Communications Antenna is permitted, so long as such repair or upgrade does not substantially change the overall size of the wireless support structure.

(2) To the extent permitted by law, any material modification to a Communications Antenna shall require notice to be provided to the City,

and possible supplemental permit approval to the original permit or authorization.

Section 4-1405. Regulations for specific applications. The following regulations shall apply only to Communications Antennas or other Communications Facilities installations that fall under the mandatory-approval provisions of the FCC's October 2014 Report and Order, as amended:

(A) Permit required. Communications Antenna Applicants proposing changes to an existing Communications Tower, base pad, related equipment, or Communications Antenna that do not substantially change the dimensions of the existing wireless support structure or otherwise fall under the pertinent provisions of the FCC's October 2014 Report and Order, shall obtain the applicable permits from the City and Frederick County. In order to be considered for such a permit, the Applicant must submit a permit application to the City and Frederick County in accordance with applicable permit policies and procedures.

(B) Timing of approval for applications that fall under the FCC's October 2014 Report and Order, as amended. Within thirty (30) calendar days of the date that an application for a Communications Antenna is filed with the City, the City shall notify the Applicant in writing of any information that may be required to complete such application. Within sixty (60) calendar days of receipt of a complete application, the City and Frederick County shall make their final decision on whether to approve the application and shall advise the Applicant in writing of such decision.

(C) Permit fees. The City may assess appropriate and reasonable permit fees directly related to the City's actual costs in reviewing and processing the application for approval of a Communications Antenna.

Section 4-1406. Additional regulations for Communications Antennas. In addition to the regulations enumerated in Section 4-1404, the following regulations shall apply to Communications Antennas that do not fall under the mandatory-approval provisions of the FCC's October 2014 Order and Report, as amended:

(A) Prohibited on certain structures. Communications Antennas shall not be located on any single-family attached dwelling, single-family dwelling or townhomes.

(B) Special Use approval required. Any Applicant proposing the construction of a new Communications Antenna, or a material modification to an existing antenna, shall first obtain Special Use authorization from City Council. The Special Use application, and accompanying documentation, shall demonstrate that the proposed facility complies with all applicable provisions in this Section of the City of Brunswick Zoning Ordinance and Code of Ordinances.

(C) Retention of experts and Reimbursement by Applicant. The City may hire any consultant and/or expert necessary to assist in reviewing and evaluating the

Application, including the construction and modification of the WCF, once permitted, and any requests for re-certification.

(1) An Applicant shall deposit with the City funds sufficient to reimburse the City for all reasonable costs incurred in the application and permitting process, including publication and notice expenses and the costs of consultant and expert evaluation and consultation to the Mayor and Council in connection with the review of any application including the construction and modification of the site, once permitted. The initial deposit shall be $3,500.00. The placement of the $3,500.00 with the Mayor and Council shall precede the pre-application meeting. The City will maintain a separate escrow account for all such funds. The City's consultants/experts shall invoice the Mayor and Council for its services in reviewing the application, including the construction and modification of the site, once permitted. If at any time during the process this escrow account has a balance less than $500.00, the Applicant shall immediately, upon notification by the City, replenish said escrow account so that it has a balance of at least $2,000.00. Such additional escrow funds shall be deposited with the City before any further action or consideration is taken on the application. In the event that the amount held in escrow by the City is more than the amount of the actual invoicing at the conclusion of the project, the remaining balance shall be promptly refunded to the Applicant.

(2) The total amount of the funds needed as set forth in Section 4-1406(C)(1) may vary with the scope and complexity of the project, the completeness of the application, and other information as may be needed to complete the necessary review, analysis and inspection of any construction or modification.

(D) Application Fee. At the time that an Applicant submits an application for a Special Use permit for a new Communications Tower, such Applicant shall pay a non-refundable application fee of $2,000.00 to the City.

(E) Permit fees. The City may assess appropriate and reasonable permit fees directly related to the City's actual costs in reviewing and processing the application for approval of a Communications Antenna, as well as inspection, monitoring, and all other related costs.

(F) Development regulations. Communications Antennas shall be co-located on existing wireless support structures subject to the following conditions:

(1) The total height of any wireless support structure and mounted Communications Antenna shall not exceed twenty (20) feet above the maximum height permitted in the underlying zoning district.

(2) In accordance with industry standards, all Communications Antenna Applicants must submit documentation to the City justifying the total height of the Communications Antenna. Documentation shall be analyzed in the context of such justification on an individual basis.

(3) If the Applicant proposes to locate the related equipment in a separate building, the building shall comply with the minimum requirements for the applicable zoning district, and landscaping shall be required to screen as much of the equipment building as possible. The screening method chosen by the Applicant shall comply with the requirements enumerated in the City of Brunswick Zoning Code and Code of Ordinances.

(G) Security fence. A security fence with a maximum height of ten (10) feet shall surround any separate communications equipment building. Vehicular access to the communications equipment building, or any structure housing related equipment, shall not interfere with the parking or vehicular circulations on the site for the principal use.

(H) Non-commercial usage exemption. City residents utilizing satellite dishes and antennas for the purpose of maintaining television, phone, radio and/or internet connections at their respective residences, as well as amateur radio operators, shall be exempt from the regulations enumerated in this section of the Zoning Ordinance and Code of Ordinances.

(I) Design regulations. Communications Antennas shall employ stealth technology or shall be treated to match the wireless support structure to which they are mounted in order to minimize aesthetic impact. The application of the stealth technology/color treatment chosen by the Applicant shall be subject to the approval of the City.

(J) Inspection. The City reserves the right to inspect any Communications Antenna to ensure compliance with the provisions of the Zoning Ordinance and any other provisions found within the City Code or state or federal law. The City and/or its agents shall have the authority to enter the property upon which a Communications Antenna is located, upon reasonable notice to the operator, to ensure such compliance.

(K) Insurance. Each person that owns or operates a Communications Antenna shall provide the City with a certificate of insurance, naming the City as an additional insured, and evidencing general liability coverage in the minimum amount of $1,000,000 per occurrence and property damage coverage in the minimum amount of $1,000,000 per occurrence covering the Communications Antenna.

Section 4-1407. Additional regulations applicable to all Communications Antennas located in the public rights-of-way ("ROW"). In addition to the regulations enumerated in Section 4-1404, the

following regulations shall apply to Communications Antennas located in the public rights-of-way:

(A) Co-location. Communications Antennas in the ROW shall be co-located on existing infrastructure, such as existing utility poles or light poles. If co-location is not technologically or economically feasible, the Applicant, with the City's approval, shall locate its Communications Antennas on existing poles or freestanding structures in the public rights-of-way that do not already act as wireless support structures.

(B) Special Use approval required. Any Applicant proposing the construction of a new Communications Antenna shall first obtain Special Use authorization from City Council. New constructions, modifications, and replacements that fall under the applicable provisions of the FCC's October 2014 Report and Order, shall not be subject to the Special Use process. The Special Use application, and accompanying documentation, shall demonstrate that the proposed facility complies with all applicable provisions in the City of Brunswick Zoning Ordinance and Code of Ordinances.

(C) Design requirements:

(1) To the extent permitted by state and federal law, Communications Antenna installations located above the surface grade in the public ROW including, but not limited to, those on streetlights and utility poles, shall consist of equipment components that are no more than six (6) feet in height and that are compatible in scale and proportion to the structures upon which they are mounted. All equipment shall be the smallest and least visibly intrusive equipment feasible.

(2) Communications Antennas and related equipment shall be treated with stealth technology by the Communications Antenna owner and/or Applicant to match the wireless support structure upon which they are mounted, and may be required to be painted, or otherwise coated, to be visually compatible with the support structure upon which they are mounted.

(D) Time, place and manner. The City shall determine the time, place and manner of construction, maintenance, repair and/or removal of all Communications Antennas in the ROW based on public safety, traffic management, physical burden on the ROW, and related considerations. For public utilities, the time, place and manner requirements shall be consistent with the police powers of the City and the requirements of the Public Utility Code.

(E) Equipment location. Communications Antennas and related equipment shall be located so as not to cause any physical or visual obstruction to pedestrian or vehicular traffic, or to otherwise create safety hazards to pedestrians and/or

motorists or to otherwise inconvenience public use of the ROW as determined by the City. In addition:

(1) Ground-mounted related equipment shall be located between the sidewalk and the curb. For reasons of safety and aesthetics, such equipment shall neither protrude onto the curb, nor obstruct the sidewalk.

(2) Ground-mounted related equipment that cannot be placed underground shall be screened, to the fullest extent possible, through the use of landscaping or other decorative features to the satisfaction of the City.

(3) Required electrical meter cabinets shall the screened to blend in with the surrounding area to the satisfaction of the City.

(4) Graffiti on any wireless support structures or any related equipment shall be removed at the sole expense of the owner.

(5) Any proposed underground vault related to Communications Antennas shall be reviewed and is subject to approval by the City.

(F) Relocation or removal of facilities. Within two (2) months following written notice from the City, or such longer period as the City determines is reasonably necessary or such shorter period in the case of an emergency, the owner of a Communications Antenna in the ROW shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any Communications Antenna when the City, consistent with its police powers and applicable Public Service Commission regulations, shall have determined that such removal, relocation, change or alteration is reasonably necessary under the following circumstances:

(1) The construction, repair, maintenance or installation of any City or other public improvement in the right-of-way;

(2) The operations of the City or other governmental entity in the ROW;

(3) Vacation of a street or road or the release of a utility easement; or

(4) An emergency as determined by the City.

Section 4-1408. General and specific requirements for all Communications Towers. The following regulations shall apply to all Communications Towers, excluding any non-commercial tower that is owned and operated by a federally licensed amateur radio operator.

(A) Standard of care. All Communications Towers shall be designed, constructed, operated, maintained, repaired, modified and removed in strict compliance with all current applicable technical, safety and safety-related codes, including but not limited to, the most recent editions of the Maryland Building Performance Standards, American National Standards Institute (ANSI) Code, Electrical Code,

as well as the accepted and responsible workmanlike industry practices of the National Association of Tower Erectors. At all times, Communications Towers shall be kept and maintained in good condition, order and repair by qualified maintenance and construction personnel, so that the same shall not endanger the life of any person or any property in the City.

(B) Notice. Upon submission of an application for a Communications Tower and the scheduling of the mandatory public hearing before City Council, the Applicant shall mail notice to all owners of every property within five hundred (500) feet of the proposed facility. The Applicant shall provide proof of the notification to the City.

(C) Special Use authorization required. Communications Towers are permitted by Special Use in certain zoning districts, at a height necessary to satisfy their function in the Applicant's wireless communications system. No Applicant shall have the right under these regulations to erect a tower to the maximum height specified in this section unless it proves the necessity for such height. The Applicant shall demonstrate that the proposed Communications Tower is the minimum height necessary for its service area.

(1) Prior to City Council's consideration of a Special Use application authorizing the construction and installation of a Communications Tower, it shall be incumbent upon the Applicant for such Special Use approval to prove to the reasonable satisfaction of City Council that the Applicant cannot adequately extend or infill its communications system by the use of equipment such as redoes, repeaters, Communications Antennas, and other similar equipment installed on existing structures, such as utility poles or their appurtenances and other available tall structures. The Applicant shall further demonstrate that the proposed Communications Tower must be located where it is proposed in order to serve the Applicant's service area and that no other viable alternative location exists.

(2) The Special Use application shall be accompanied by a propagation study evidencing the need for the proposed tower or other communication facilities and equipment, a description of the type and manufacturer of the proposed transmission/radio equipment, the frequency range (megahertz band) assigned to the Applicant, the power in watts at which the Applicant transmits, and any relevant related tests conducted by the Applicant in determining the need for the proposed site and installation.

(3) The Special Use application shall be accompanied by documentation demonstrating that the proposed Communications Tower complies with all state and federal laws and regulations concerning aviation safety.

(4) Where the Communications Tower is located on a property with another principal use, the Applicant shall present documentation to City Council that the owner of the property has granted an easement for the proposed

Communications Tower and that vehicular access will be provided to the facility.

(5) The Special Use application shall be accompanied by documentation demonstrating that the proposed Communications Tower complies with all applicable provisions in this Chapter.

(D) Engineer inspection. Prior to City Council's issuance of a permit authorizing construction and erection of a Communications Tower, a structural engineer registered in Maryland shall issue to the City a written certification of the proposed Communications Tower's ability to meet the structural standards offered by either the Electronic Industries Association or the Telecommunication Industry Association and certify the proper construction of the foundation and the erection of the structure. This certification shall be provided during the Special Use proceedings before City Council, or at a minimum, be made as a condition attached to any approval given such that the certification be provided prior to issuance of any building permits.

(E) Visual appearance. All Communications Towers and related equipment shall be aesthetically and architecturally compatible with the surrounding environment and shall maximize the use of a like facade to blend with the existing surroundings and neighboring buildings to the greatest extent possible. City Council shall consider whether its decision upon the subject application will promote the harmonious and orderly development of the zoning district and/or surrounding area involved; encourage compatibility with the character and type of development existing in the area; benefit neighboring properties by preventing a negative impact on the aesthetic character of the community; preserve woodlands and trees existing at the site to the greatest possible extent; and encourage sound engineering and construction principles, practices and techniques.

(1) An Applicant may be required to submit an Environmental Assessment Analysis and a Visual Assessment. Based on the results of the Analysis, including the Visual Assessment, the City may require submission of a more detailed visual analysis. The scope of the required Environmental and Visual Assessment will be reviewed at the pre-application meeting. The Visual Impact Assessment shall include:

(a) A "Zone of Visibility Map" which shall be provided in order to determine locations from which the tower may be seen.

(b) Pictorial representations of the "before and after" views from key viewpoints both inside and outside of the City as may be appropriate, including but not limited to state highways and other major roads; state and local parks; other public lands; historic districts; preserves and historic sites normally open to the public; and from any other location where the site is visible

to a large number of visitors, travelers, or residents. Guidance will be provided, concerning the appropriate key sites at a pre-application meeting.

(c) An assessment of the visual impact of the Communications Tower base, guy wires and accessory buildings from abutting and adjacent properties and streets as relates to the need of appropriateness of screening.

(F) Co-location and siting. An application for a new Communications Tower shall first demonstrate that the proposed Communications Tower cannot be accommodated on land or structures owned by the City of Brunswick. If such accommodation is not possible, the Applicant shall demonstrate that the proposed tower cannot be sited on structures already approved for the placement of wireless facilities. City Council may deny an application to construct a new Communications Tower if the Applicant has not made a good faith effort to mount a Communications Antenna on an existing structure. The Applicant shall demonstrate that it contacted the owners of tall structures, buildings, and towers within a four (4) mile radius of the site proposed, sought permission to install a Communications Antenna on those structures, buildings, and towers and was denied for one of the following reasons:

(1) The proposed antenna and related equipment would exceed the structural capacity of the existing building, structure or tower, and its reinforcement cannot be accomplished at a reasonable cost.

(2) The proposed antenna and related equipment would cause radio frequency interference with other existing equipment for that existing building, structure, or tower and the interference cannot be prevented at a reasonable cost.

(3) Such existing buildings, structures, or towers do not have adequate location, space, access, or height to accommodate the proposed equipment or to allow it to perform its intended function.

(4) A commercially reasonable agreement could not be reached with the owner of such building, structure, or tower.

(G) Permit required for modifications. To the extent permissible under applicable state and federal law, any Applicant proposing the modification of an existing Communications Tower, which substantially changes the overall height of such wireless support structure, shall first obtain the applicable permits from the City and Frederick County.

(H) Gap in coverage or capacity. The Applicant must demonstrate that a significant gap in wireless coverage or capacity exists in the applicable area and that the type of Communications Tower being proposed is the least intrusive means by which to fill

that gap. The existence or non-existence of a gap in wireless coverage or capacity shall be a factor in City Council's decision on an application for approval of Communications Tower.

(I) Additional Communications Antennas. The Applicant shall provide the City with a written commitment that it will allow other service providers to co-locate Communications Antennas on Communications Towers where technologically and economically feasible. To the extent permissible under federal and state law, the owner of a Communications Tower shall not install any additional Communications Antennas without obtaining the prior written approval of the City.

(J) Wind. All Communications Towers shall be designed to withstand the effects of wind gusts to the standard designed by the American National Standards Institute as prepared by the engineering departments of the Electronics Industry Association, and Telecommunications Industry Association (ANSI/EIA/TIA-222), as amended.

(K) Height. The maximum height of any Communications Tower shall be one hundred forty (140) feet. Communications Towers in the ROW shall not exceed a height comparable to the average height of utility poles or electrical poles within a two (2) block radius of the proposed facility, unless the Applicant proves to the satisfaction of the Mayor and Council that it cannot infill its gap in coverage or capacity at such height.

(L) Related Equipment. Either a one single-story wireless communications equipment building not exceeding two hundred fifty (250) square feet in area, or up to five boxes placed on a pad not exceeding ten (10) feet by twenty (20) feet in area housing related equipment or a base station, may be located on the site for each unrelated company sharing space on the Communications Tower.

(M) Public safety communications and other communications services. No Communications Tower shall interfere with public safety communications or the reception of broadband, television, radio or other communication services enjoyed by occupants of nearby properties.

(N) Maintenance. The following maintenance requirements shall apply:

(1) A Communications Tower shall be fully automated and unattended on a daily basis and shall be visited only for maintenance or emergency repair.

(2) Such maintenance shall be performed to ensure the upkeep of the Communications Tower in order to promote the safety and security of the City's residents, and utilize the best available technology for preventing failures and accidents.

(O) Radio frequency emissions. A Communications Tower shall not, by itself or in conjunction with other Communications Towers or antennas, generate radio

frequency emissions in excess of the standards and regulations of the FCC, including but not limited to, the FCC Office of Engineering Technology Bulletin 65 entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radio Frequency Electromagnetic Fields," as amended.

(P) Historic buildings or districts. To the extent permitted by state and federal law, no Communications Tower may be located upon any property, or on a building or structure, that is listed on either the National or Maryland Registers of Historic Places (either inside or outside the public rights-of-way), or that is deemed by the City to be local historic significance.

(Q) Signs. All Communications Towers shall post a sign in a readily visible location identifying the name and phone number of a party to contact in the event of an emergency. The only other signage permitted on the Communications Tower shall be those required by the FCC, or any other federal or state agency.

(R) Lighting. No Communications Tower shall be artificially lighted, except as required by law. If lighting is required, the Applicant shall provide a detailed plan for sufficient lighting, demonstrating as unobtrusive and inoffensive an effect as is permissible under state and federal regulations. The Applicant shall promptly report any outage or malfunction of FAA-mandated lighting to the appropriate governmental authorities and the City Manager.

(S) Noise. Generators shall be located below grade and suitably soundproofed so that noise volumes measured at all property lines do not exceed levels as outlined in the Zoning Code of the City of Brunswick, the Code of Ordinances, or by state law.

(T) Aviation safety. Communications Towers shall comply with all federal and state laws and regulations concerning aviation safety.

(U) Retention of Experts and Reimbursement by Applicant. The City may hire any consultant and/or expert necessary to assist in reviewing and evaluating the Application, including the construction and modification of the WCF, once permitted, and any requests for re-certification.

(1) An Applicant shall deposit with the City funds sufficient to reimburse the City for all reasonable costs incurred in the application and permitting process, including publication and notice expenses and the costs of consultant and expert evaluation and consultation to the Mayor and Council in connection with the review of any application including the construction and modification of the site, once permitted. The initial deposit shall be $5,000.00. The placement of the $5,000.00 with the Mayor and Council shall precede the pre-application meeting. The City will maintain a separate escrow account for all such funds. The City's consultants/experts shall invoice the Mayor and Council for its services in reviewing the application, including the construction and modification of the site, once permitted. If

at any time during the process this escrow account has a balance less than $2,000.00, the Applicant shall immediately, upon notification by the City, replenish said escrow account so that it has a balance of at least $3,500.00. Such additional escrow funds shall be deposited with the City before any further action or consideration is taken on the application. In the event that the amount held in escrow by the City is more than the amount of the actual invoicing at the conclusion of the project, the remaining balance shall be promptly refunded to the Applicant.

(2) The total amount of the funds needed as set forth in Section 4-1408(FF)(1) may vary with the scope and complexity of the project, the completeness of the application, and other information as may be needed to complete the necessary review, analysis and inspection of any construction or modification.

(V) Timing of approval pursuant to FCC regulations, as amended. Within thirty (30) calendar days of the date that an application for a Communications Tower is filed with the City, the City shall notify the Applicant in writing of any information that may be required to complete such application. All applications for Communications Towers shall be acted upon within one hundred fifty (150) days of the receipt of a fully completed application for the approval of such Communications Tower and the City shall advise the Applicant in writing of its decision.

(W) Non-conforming uses. Non-conforming Communications Towers which are hereafter damaged or destroyed due to any reason or cause may be repaired and restored at their former location, but must otherwise comply with the terms and conditions of this section.

(X) Removal. In the event that use of a Communications Tower is planned to be discontinued, the owner shall provide written notice to the City of its intent to discontinue use and the date when the use shall be discontinued. Unused or abandoned Communications Towers, or portions of Communications Towers, shall be removed as follows:

(1) All unused or abandoned Communications Towers and related equipment shall be removed within two (2) months of the cessation of operations at the site unless a time extension is approved by the City.

(2) If the Communications Tower and/or related equipment is not removed within two (2) months of the cessation of operations at a site, or within any longer period approved by the City, the Communications Tower and related equipment may be removed by the City and the cost of removal assessed against the owner of the Communications Tower. As security, the City reserves the right to the salvage value of any removed Communications Tower and/or related equipment, if such

Communications Tower and/or related equipment are not removed by the owner within the timeframes enumerated in this Chapter.

(3) Any unused portions of Communications Towers, including antennas, shall be removed within two (2) months of the time of cessation of operations. The City must approve all replacements of portions of a Communications Tower previously removed.

(Y) Permit Fees. The City may assess appropriate and reasonable permit fees directly related to the City's actual costs in reviewing and processing the application for approval of a Communications Tower, as well as related inspection, monitoring, and related costs.

(Z) FCC license. Each person that owns or operates a Communications Tower over forty (40) feet in height shall submit a copy of its current FCC license, including the name, address, and emergency telephone number for the operator of the facility.

(AA) Insurance. Each person that owns or operates a Communications Tower greater than forty (40) feet in height shall provide the City with a certificate of insurance naming the City as an additional insured, and evidencing general liability coverage in the minimum amount of $5,000,000 per occurrence and property damage coverage in the minimum amount of $5,000,000 per occurrence covering the Communications Tower. Each person that owns or operates a Communications Tower forty (40) feet or less in height shall provide the City with a certificate of insurance naming the City as an additional insured, and evidencing general liability coverage in the minimum amount of $1,000,000 per occurrence and property damage coverage in the minimum amount of $1,000,000 per occurrence covering each Communications Tower.

(BB) Indemnification. Each person that owns or operates a Communications Tower shall, at its sole cost and expense, indemnify, defend and hold harmless the City, its elected and appointed officials, employees and agents, at all times against any and all claims for personal injury, including death, and property damage arising in whole or in part from, caused by or connected with any act or omission of the person, its officers, agents, employees or contractors arising out of, but not limited to, the construction, installation, operation, maintenance or removal of the Communications Tower. Each person that owns or operates a Communications Tower shall defend any actions or proceedings against the City in which it is claimed that personal injury, including death, or property damage was caused by the construction, installation, operation, maintenance or removal of the Communications Tower. The obligation to indemnify, hold harmless and defend shall include, but not be limited to, the obligation to pay judgments, injuries, liabilities, damages, reasonable attorneys' fees, reasonable expert fees, court costs and all other costs of indemnification.

(CC) Engineer signature. All plans and drawings for a Communications Tower shall contain a seal and signature of a professional structural engineer, licensed in the State of Maryland.

(DD) Financial security. Prior to receipt of a zoning permit for the construction or placement of a Communications Tower, the Applicant shall provide to the City financial security in an amount of at least $75,000 to guarantee the construction of the Communications Tower. Said financial security shall remain in place until the Communications Tower is fully constructed. Should the Communications Tower be abandoned by the owner and/or operator, and not removed within two (2) months of such abandonment, the City shall have the authority to remove the Communications Tower and sell all of its pieces, as well as related equipment, used in the operation of the Communications Tower, in order to recover the cost of said removal.

(EE) Re-certification of Special Use Permit. Between twelve (12) and six (6) months prior to the five (5) year anniversary date after the effective date of the Special Use Permit and all subsequent five year anniversaries of the effective date of the original Special Use Permit for a Communications Tower, the holder of a Special Use Permit for such Communications Tower shall submit a signed written request to the Board for re-certification.

(1) In the written request for re-certification, the holder of such Special Use Permit shall note the following:

(a) The name of the holder of the Special Use Permit for the Communications Tower;

(b) If applicable, the number or title of the Special Use Permit;

(c) The date of the original granting of the Special Use Permit;

(d) Whether the Communications Facilities have been moved, re-located, rebuilt, or otherwise visibly modified since the issuance of the Special Use Permit and, if so, in what manner the Communications Tower has been moved, re-located, rebuilt, or otherwise visibly modified and whether the City approved such action;

(e) That the Communications Tower is in compliance with the Special Use Permit and all applicable codes, laws, rules and regulations;

(f) Re-certification that the Communications Tower and attachments both are designed and constructed and continue to meet all local, City, State and Federal structural requirements for loads, including wind and ice loads. Such re-certification shall be by a Professional Engineer licensed in the State, the cost of which shall be borne by the Applicant.

(2) Any decision requiring the cessation of use of the Communications Tower or imposing a penalty shall be in writing and supported by substantial evidence contained in a written record and shall be promptly provided to the owner of the Communications Tower.

(3) If the Applicant has submitted all of the information requested and required, and if the review is not completed, as noted in Section 4-1408(GG), prior to the five (5) year anniversary date of the Special Use Permit, or subsequent five-year anniversaries, then the Applicant for the permitted Communications Towers shall receive an extension of the Special Use Permit for up to six (6) months to allow for completion of the review.

(4) If the holder of a Special Use Permit for a Communications Tower does not submit a request for re-certification of such Special Use Permit within the time frame noted in 4-1408(PP), unless otherwise excused by Council for minor technical defects such Special Use Permit and any authorizations granted thereunder shall cease to exist on the date of the fifth anniversary of the original granting of the Special Use Permit, or subsequent five-year anniversaries thereof, unless the holder of the Special Use Permit adequately demonstrates that extenuating circumstances prevented a timely re-certification request. If Council agrees that there were legitimately extenuating circumstances, then the holder of the Special Use Permit may submit a late re-certification request or application for a new Special Use Permit.

Section 4-1409. Additional requirements for Communications Towers located outside the public rights-of-way. In addition to the regulations enumerated in Section 4-1408, the following regulations shall apply to Communications Towers located outside the Public Rights-of-Way:

(A) Development regulations**.**

(1) Communications Towers are permitted via Special Use, subject to the prohibitions contained herein, in the following locations in order of priority, with one (1) being the highest priority and four (4) being the lowest priority.

(1) On City-owned properties;

(2) On properties in areas zoned for Heavy Industrial use;

(3) On properties in areas zoned for Commercial use;

(4) On properties in areas zoned for Agricultural use;

(2) If the proposed site is not proposed for the highest priority listed above, then a detailed explanation must be provided as to why all sites of a higher priority were not selected. The Applicant seeking such exception must satisfactorily demonstrate the reason or reasons why such a permit should be granted for the proposed site, and the hardship that would be incurred by the Applicant if the Special Use permit was not granted for the proposed site.

(3) Sole use on a lot. A Communications Tower shall be permitted as a sole use on a lot, provided that the underlying lot meets the minimum size specifications set forth in the City Zoning Code.

(4) Combined with another use. A Communications Tower may be permitted on a property with an existing use, or on a vacant parcel in combination with another use, except residential, subject to the following conditions:

(a) The existing use on the property may be any permitted use in the applicable district, and need not be affiliated with the Communications Tower.

(b) Minimum lot area. The minimum lot shall comply with the requirements for the applicable zoning district and shall be the area needed to accommodate the Communications Tower and guy wires, the equipment building, security fence, and buffer planting if the proposed Communications Tower is greater than forty (40) feet in height.

(c) Minimum setbacks. The minimum distance between the base of a Communications Tower and any adjoining property line or street right-of-way line shall be equal to one hundred ten percent (110%) of the height of the Communications Tower. The underlying lot must be large enough to accommodate related equipment and all other features typically found within the immediate area of a Communications Tower.

(B) Design regulations.

(1) The Communications Tower shall employ the most current stealth technology available in an effort to appropriately blend into the surrounding environment and minimize aesthetic impact. Application of the stealth technology chosen by the Applicant shall be subject to the approval of the City Zoning Hearing Board.

(2) To the extent permissible by law, any height extensions to an existing Communications Tower shall require prior approval of the City.

(3) Any proposed Communications Tower shall be designed structurally, electrically, and in all respects, to accommodate both the Applicant's

Communications Antennas and comparable antennas, for the maximum amount of future users based on the size of the proposed Communications Tower.

(4) Any Communications Tower over forty (40) feet in height shall be equipped with an anti-climbing device, as approved by the manufacturer.

(C) Surrounding environs.

(1) The Applicant shall ensure that the existing vegetation, trees and shrubs located within proximity to the Communications Tower shall be preserved to the maximum extent possible.

(2) The Applicant shall submit a soil report to the City complying with the standards of Appendix I: Geotechnical Investigations, ANSI/EIA-222, as amended, to document and verify the design specifications of the foundation of the Communications Tower, and anchors for guy wires, if used.

(D) Fence/screen.

(1) A security fence with a maximum height of ten (10) feet shall completely surround any Communications Tower greater than forty (40) feet in height, as well as guy wires, or any building housing related equipment.

(2) The base of a Communications Tower shall be landscaped so as to screen the foundation, base and communications equipment building from abutting properties. Existing vegetation on and around the site shall be preserved to the greatest extent possible. The landscaping and/or screening method chosen by the Applicant shall comply with all applicable regulations enumerated in the City Zoning Code.

(E) Related equipment.

(1) Ground-mounted related equipment associated to, or connected with, a Communications Tower shall be placed underground or screened from public view using stealth technologies or plant screening, as described herein.

(2) All related equipment shall be architecturally designed to blend into the environment in which it is situated and shall meet the minimum setback requirements of the underlying zoning district.

(3) Upon application for a Communications Towers, information shall be provided, detailing the contents of the proposed equipment building servicing the proposed Communications Tower. The information shall

include, but not be limited to, the type and quantity of oil, gasoline, batteries, propane, natural gas or any other fuel stored within the building. Information shall also be submitted which demonstrates that any hazardous materials stored on site, including but not limited to fuel sources shall be housed to minimize the potential for any adverse impact on adjacent land uses. Materials safety data sheets for any hazardous material stored or utilized in the equipment building shall be submitted to the municipality. The use of fuels and hazardous materials shall also be consistent with any federal, state or municipal requirements regarding the same.

(F) Access road. An access road, turnaround space and parking shall be provided to ensure adequate emergency and service access to Communications Towers. The access road shall be a dust-free all-weather surface for its entire length. Maximum use of existing roads, whether public or private, shall be made to the extent practicable. Road grades shall closely follow natural contours to assure minimal visual disturbance and minimize soil erosion. Where applicable, the Communications Tower owner shall present documentation to the City that the property owner has granted an easement for the proposed facility.

(G) Parking. For each Communications Tower greater than forty (40) feet in height, there shall be two off-street parking spaces.

(H) Inspection. The City reserves the right to inspect any Communications Tower to ensure compliance with the Zoning Ordinance and any other provisions found within the City Code or state or federal law. The City and/or its agents shall have the authority to enter the property upon which a Communications Tower is located at any time, upon reasonable notice to the operator, to ensure such compliance.

(I) Application Fee. At the time that an Applicant submits an application for a Special Use permit for a new Communications Tower, such Applicant shall pay a non-refundable application fee of $5,000.00 to the City, in addition to the $5,000.00 placed in the escrow account pursuant to Section 4-1408(U)(1).

Section 4-1410. Additional requirements for Communications Towers located within the public ROW. In addition to the regulations enumerated in Section 4-1408, the following regulations shall apply to Communications Towers located in the public rights-of-way.

(A) Location and development standards.

(1) Communications Towers in the ROW shall not exceed a height comparable to the average height of utility poles or electrical poles within a two (2) block radius of the proposed facility.

(2) Communications Towers shall not be located in the front façade area of any structure.

(3) Communications Towers shall be permitted along certain roads by Special Use throughout the City, regardless of the underlying zoning district. A listing of such roads is kept on file at the City Zoning Office and is adopted via Resolution of City Council.

(B) Time, place and manner. The City shall determine the time, place and manner of construction, maintenance, repair and/or removal of all Communications Towers in the ROW based on public safety, traffic management, physical burden on the ROW, and related considerations. For public utilities, the time, place and manner requirements shall be consistent with the police powers of the City and the requirements of the Public Utility Code.

(C) Equipment location. Communications Towers and related equipment shall be located so as not to cause any physical or visual obstruction to pedestrian or vehicular traffic, or to otherwise create safety hazards to pedestrians and/or motorists or to otherwise inconvenience public use of the ROW as determined by the City. In addition:

(1) Ground-mounted related equipment shall be located between the sidewalk and the curb. For reasons of safety and aesthetics, such equipment shall neither protrude onto the curb, nor obstruct the sidewalk.

(2) Ground-mounted related equipment that cannot be placed underground shall be screened, to the fullest extent possible, through the use of landscaping or other decorative features to the satisfaction of City Council.

(3) Required electrical meter cabinets shall the screened to blend in with the surrounding area.

(4) Any graffiti on the tower or on any related equipment shall be removed at the sole expense of the owner.

(5) Any underground vaults related to Communications Towers shall be reviewed and approved by City Council.

(D) Design regulations.

(1) A Communications Tower shall employ the most current stealth technology available in an effort to appropriately blend into the surrounding environment and minimize aesthetic impact. The application of the stealth technology chosen by the Applicant shall be subject to the approval of the City Council.

(2) To the extent permissible under state and federal law, any height extensions to an existing Communications Tower shall require prior approval of the City, and shall not violate the provisions described herein.

(3) A Communications Tower shall be designed structurally, electrically, and in all respects to accommodate both the Applicant's Communications Antennas and comparable antennas for the maximum amount of future users based on the size of the proposed Communications Tower.

(4) The siting and construction of Communications Towers and related equipment along the City's streets and sidewalks shall not impact the City's obligations outlined in the Americans with Disabilities Act (ADA), as amended.

(5) The base of a Communications Tower shall not impede pedestrian walkways or extend into the cartway.

(E) Relocation or removal of facilities. Within sixty (60) days following written notice from the City, or such longer period as the City determines is reasonably necessary or such shorter period in the case of an emergency, an owner of a Communications Tower in the ROW shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any Communications Tower when the City, consistent with its police powers and applicable Public Service Commission regulations, shall determine that such removal, relocation, change or alteration is reasonably necessary under the following circumstances:

(1) The construction, repair, maintenance or installation of any City or other public improvement in the right-of-way;

(2) The operations of the City or other governmental entity in the right-of-way;

(3) Vacation of a street or road or the release of a utility easement; or

(4) An emergency as determined by the City.

(F) Reimbursement for ROW use. In addition to permit fees as described in this section, every Communications Tower in the ROW is subject to the City's right to fix annually a fair and reasonable fee to be paid for use and occupancy of the ROW. Such compensation for ROW use shall be directly related to the City's actual ROW management costs including, but not limited to, the costs of the administration and performance of all reviewing, inspecting, permitting, supervising and other ROW management activities by the City. The owner of each Communications Tower shall pay an annual fee to the City to compensate the City for the City's costs incurred in connection with the activities described above.

SECTION V. Miscellaneous

A. Police powers. The City, by granting any permit or taking any other action pursuant to this chapter, does not waive, reduce, lessen or impair the lawful police powers vested in the City under applicable federal, state and local laws and regulations.

B. Severability. If any section, subsection, sentence, clause, phrase or word of this Ordinance is for any reason held illegal or invalid by any court of competent jurisdiction, such provision shall be deemed a separate, distinct and independent provision, and such holding shall not render the remainder of this Chapter invalid.

C. Effective Date. This Ordinance shall become effective thirty (30) days after enactment by the City of Brunswick.

ENACTED AND ORDAINED this day of , 2018.

_____ _____

Date Council President

_____ _____

Date Mayor

ORDINANCE NO. 17-10-01

AN ORDINANCE TO REGULATE WIRELESS TELECOMMUNICATION FACILITIES AND COMPLEXES WITHIN THE TOWN OF MIDDLETOWN.

SECTION I. BE IT ORDAINED AND ENACTED by the Burgess and Commissioners of Middletown that Title 5, of the Middletown Municipal Code be, and hereby is, amended by adding thereto the attached Ordinance entitled "Wireless Telecommunications Facilities or Complexes" which is incorporated by reference herein, said Ordinance to be codified in the Code as Title 5, Chapter 5.12 "Wireless Telecommunications Facilities or Complexes".

SECTION II. BE IT FURTHER ENACTED AND ORDAINED that this Ordinance shall take effect twenty (20) calendar days following its approval by the Burgess and Commissioners.

INTRODUCED ON THE 23rd DAY OF OCTOBER, 2017

PASSED ON THE 8th DAY OF January, 2018

EFFECTIVE DATE: January 28, 2018

ATTEST:

Andrew J. Bowen, Town Administrator

BURGESS AND COMMISSIONERS OF MIDDLETOWN

By: _____
John D. Miller, Burgess

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Wireless Telecommunications Facilities or Complexes

Section 1. Purpose and Legislative Intent

1. The Telecommunications Act of 1996 affirmed the Town of Middletown's authority concerning the placement, construction and Modification of Wireless Telecommunications Facilities or Complexes. This ordinance provides for the safe and efficient integration of Wireless Facilities or Complexes Necessary for the provision of advanced wireless telecommunications services throughout the community and to ensure the ready availability of reliable wireless services to the public, government agencies and first responders, with the intention of furthering the public safety and general welfare.

2. The Town of Middletown (Town) finds that Wireless Telecommunications Facilities (Facilities) and Complexes may pose significant concerns to the health, safety, public welfare, character and environment of the Town and its inhabitants. The Town also recognizes that facilitating the development of wireless service technology can be an economic development asset to the Town and of significant benefit to the Town and its residents. To assure that the placement, construction or Modification of a Facility or Complex is consistent with the Town's land use policies, the Town is adopting a single, comprehensive, Wireless Telecommunications Facility or Complex application and permitting process. The intent of this Ordinance is to minimize the physical impact of Wireless Telecommunications Facilities on the community, protect the character of the community to the extent reasonably possible, establish a fair and efficient process for review and approval of applications, assure an integrated, comprehensive review of environmental impacts of such facilities, and protect the health, safety and welfare of the Town.

Section 2. Severability

1. If any word, phrase, sentence, part, section, subsection, or other portion of this Ordinance or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed Application thereof, shall be severable, and the remaining provisions of this Ordinance, and all applications thereof, not having been declared void, unconstitutional, or invalid, shall remain in full force and effect.

2. Any Special Use Permit issued pursuant to this Ordinance shall be comprehensive and not severable. If part of a permit is deemed or ruled to be invalid or unenforceable in any material respect, by a competent authority, or is overturned by a competent authority, the permit shall be void in total, upon determination by the Town.

Section 3. Definitions

For purposes of this Ordinance, and where not inconsistent with the context of a particular section, the defined terms, phrases, words, abbreviations, and their derivations shall have the meaning given in this section. When not inconsistent with the context, words in the present tense include the future tense, words used in the plural number include words in the singular number and words in the singular number include the plural number. The word "shall" is always mandatory, and not merely directory.

1. **"Accessory Facility** or **Structure"** means an accessory facility or structure serving or being used in conjunction with Wireless Telecommunications Facilities or Complexes, including but not limited to utility or transmission equipment storage sheds or cabinets.

2. **"Amend", "Amendment"** and **"Amended"** mean and shall relate to any change, addition, correction, deletion, replacement or substitution, other than typographical changes of no effect.

3. **"Applicant"** means any Wireless service provider submitting an Application for a Special Use Permit for Wireless Telecommunications Facilities.

4. **"Application"** means all Necessary and *required* documentation that an Applicant submits in order to receive a Special Use Permit or a Building Permit for Wireless Telecommunications Facilities.

5. **"Antenna"** means a system of electrical conductors that transmit or receive electromagnetic waves or radio frequency or other wireless signals.

6. **"Certificate of Completion"** or **"COC"** means a required document issued by the Town that confirms that all work represented in the application i) was properly permitted; ii) was done in compliance with and fulfilled all conditions of all permits, including any final completion deadline; iii) was fully constructed as approved and permitted; and iv) a final inspection was requested, conducted and the Facility or Complex passed the final inspection.

7. **"Co-location"** means the use of an existing approved structure to support Antenna for the provision of wireless services.

8. **"Commercial Impracticability"** or **"Commercially Impracticable"** means the inability to perform an act on terms that are reasonable in commerce, the cause or occurrence of which could not have been reasonably anticipated or foreseen and that jeopardizes the financial efficacy of the project. The inability to achieve a satisfactory financial return on investment or profit, standing alone and for a single site, shall not deem a situation to be "commercially impracticable" and shall not render an act or the terms of an agreement "commercially impracticable".

9. **"Completed Application"** means an Application that contains all necessary and required information and/or data as set forth in this Ordinance and that is necessary to enable an informed decision to be made with respect to an Application and action on the Application.

10. **"Complex"** means the entire site or Facility, including all structures and equipment located at the site.

11. **"DAS"** or **"Distributive Access System"** means a technology using antenna combining technology allowing for multiple carriers or Wireless Service Providers to use the same set of antennas, cabling or fiber optics.

12. **"Eligible Facility"** means an existing wireless tower or base station that involves collocation of new transmission equipment or the replacement of transmission equipment that does not constitute a Substantial modification. An Eligible Facility Application shall be acted upon administratively and shall not require a Special Use Permit, but shall require Staff Administrative Approval.

13. **"FAA"** means the Federal Aviation Administration, or its duly designated and authorized successor agency.

14. **"Facility"** means a set of wireless transmitting and/or receiving equipment, including any associated electronics and electronics shelter or cabinet and generator.

15. **"FCC"** means the Federal Communications Commission, or its duly designated and authorized successor agency.

16. **"Height"** means, the distance measured from the pre-existing grade level to the highest point on the Tower or support structure, even if said highest point is an Antenna or lightening protection device. As regards increasing the height of an existing structure, Height means the height above the top of the structure prior to any work related to a wireless Facility.

17. **"In-Kind Replacement"** means replacing a component(s) that is malfunctioning with a properly functioning component of the same weight and dimensions and increase the compensation paid to the owner or manager of the support structure.

18. **"Maintenance"** means plumbing, electrical, carpentry or mechanical work that may or may not require a building permit, but that does not constitute a Modification of the WTF.

19. **"Modification"** or **"Modify"** means, the addition, removal or change of any of the physical and visually discernable components or aspects of a wireless Facility or Complex with identical components, including but not limited to antennas, cabling, equipment shelters, landscaping, fencing, utility feeds, changing the color or materials of any visually discernable components, vehicular access, parking and/or an upgrade or change-out of equipment for better or more modern equipment. Adding a new wireless carrier or service provider to an existing support structure or Tower as a co-location is a Modification, unless the height, profile or size of the compound is increased, in which case it is not a Modification.

20. **"Necessary"** or **"Necessity"** or **"Need"** all mean what is technologically required for the equipment to function as designed by the manufacturer and that anything less will result in the effect of prohibiting the provision of service as intended and described in the narrative of the Application. Necessary, Necessity or Need does not mean what may be desired, preferred or the most cost-efficient approach and is not related to an Applicant's specific chosen design standards.

21. **"NIER"** means Non-Ionizing Electromagnetic Radiation.

22. **"Person"** means any individual, corporation, estate, trust, partnership, joint stock company, association of two (2) or more persons having a joint common interest, or any other entity.

23. **"Personal Wireless Facility"** See definition for 'Wireless Telecommunications Facilities'.

24. **"Personal Wireless Services"** or **"PWS"** or **"Personal Telecommunications Service"** or **"PTS"** shall have the same meaning as defined and used in the 1996 Telecommunications Act.

25. **"Repairs and Maintenance"** means the replacement or repair of any components of a wireless Facility or Complex where the replacement is effectively identical to the component being replaced, or for any matters that involve the normal repair and maintenance of a wireless Facility or Complex without the addition, removal or change of any of the physical or visually discernable components or aspects of a wireless Facility or Complex that will impose new visible burdens of the Facility or Complex as originally permitted. Any work that changes the services provided to or from the Facility, or the equipment, is not Repairs or Maintenance.

26. **"Special Use Permit"** means the official document or permit by which an Applicant is allowed to file for a building permit to construct and use a Facility or Complex as granted or issued by the Town.

27. **"Stealth"** or **"Stealth Siting Technique"** means a design or treatment that minimizes adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and in generally the same area as the requested location of such Wireless Telecommunications Facilities, which shall mean building the least visually and physically intrusive facility and Complex that is not technologically or commercially impracticable under the facts and circumstances. Stealth technique includes such techniques as i) DAS or its functional equivalent; or ii) camouflage where the Tower is disguised to make it less visually obtrusive and not recognizable to the average person as a Wireless Facility or Complex.

28. **"State"** means the State of Maryland.

29. **"Structural Capability"** or **"Structural Capacity"** or **"Structural Integrity"** means, notwithstanding anything to the contrary in any other standard, code, regulation or law, up to and not exceeding a literal 100% of the designed loading and stress capability of the support structure.

30. **"Substantial Modification"** means a change or Modification that

a. increases the existing vertical height of the structure by the greater of (a) more than ten percent (10%) or (b) the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet; or

b. except where necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable, adding an appurtenance to the body of a wireless support structure that protrudes horizontally from the edge of the wireless support structure the greater of (i) more than 20 feet or (ii) more than the width of the wireless support structure at the level of the appurtenance; or

c. increases the square footage of the existing equipment compound by more than 2,500 square feet.

31. **"Telecommunications"** means the transmission and/or reception of audio, video, data, and other information by wire, radio frequency, light, and other electronic or electromagnetic systems.

32. **"Telecommunications Site"** See definition for Wireless Telecommunications Facilities.

33. **"Telecommunications Structure"** means a structure used primarily to support equipment used to provide wireless communications or was originally constructed primarily for such purpose.

34. **"Temporary"** means not permanent in relation to all aspects and components of this Ordinance and that will exist for fewer than ninety (90) calendar days.

35. **"Tower"** means any structure designed primarily to support an antenna and/or other equipment for receiving and/or transmitting a wireless signal and is the lesser of i) more than ten feet (10') taller than the adjacent buildings or trees; or ii) taller than thirty-five feet (35').

36. **"Town"** means the Burgess and Commissioners of Middletown, Maryland

37. **"Wireless Telecommunications Facility** or **Facilities (WTF or WTFs)", "Facility", "Site", "Complex", "Telecommunications Site"** and **"Personal Wireless Facility Site"** all mean a specific location at which a structure that is designed or intended to be used to house, support or accommodate Antennas or other transmitting or receiving equipment is located. This includes without limit, Towers and support structures of all types and kinds, including but not limited to buildings, church steeples, silos, water Towers, signs or other any other structure that is used or is proposed to be used as a support structure for Antennas or the functional equivalent of such. It expressly includes all related facilities and equipment such as cabling, radios and other electronic equipment, equipment shelters and enclosures, cabinets and other structures associated with the Complex used to provide, though not limited to, radio, television, cellular, SMR, paging, 911, Personal Communications Services (PCS), commercial satellite services, microwave services, Internet access service and any commercial wireless telecommunication service whether or not licensed by the FCC.

Section 4. General Policies and Procedures for Applications under this Ordinance

In order to ensure that the location, placement, construction and Modification of a Facility or the components of a Complex do not endanger or jeopardize the Town's health, safety, public welfare, environmental features, the nature and character of the community or neighborhood and other aspects of the quality of life specifically listed elsewhere in this Ordinance, the Town hereby adopts an overall policy and related procedures with respect to the submittal, review, approval and issuance of permits or Administrative Approval granted authority for Wireless Facilities for the express purpose of achieving the following outcomes:

1. The Town shall not be required to issue a permit for a carrier to achieve its goal from a single location and facility only, and instead may require that multiple smaller and less intrusive facilities be used to achieve the Applicant's goal.

2. Requiring a Special Use Permit for any new Complex, Facility or any Substantial Modification of a Facility or Complex or for a Co-located Facility;

3. Requiring Administrative Approval and a properly issued Building Permit for any co-location or Modification of a Facility or Complex that is not a Substantial Modification or Substantial Co-location.

4. Implementing an Application process and requirements;

5. Establishing procedures for examining an Application and issuing a Special Use Permit or Administrative Approval that are fair and consistent;

6. Promoting, and requiring wherever possible, the sharing and/or co-location of support structures among service providers;

7. Requiring, promoting and encouraging, wherever possible, the placement, height and quantity of attachments to a Facility or Complex in such a manner as to minimize the physical and visual impact on the community, including but not limited to the use of stealth siting techniques.

8. Requiring that the Facility and Complex shall be the least visually intrusive among those options that are not technologically impracticable given the facts and circumstances.

9. The Town is the officially designated agency or body of the municipality to whom applications for a Special Use Permit for a Facility or Complex must be made, and that is authorized to make decisions with respect to granting or not granting or revoking Special Use Permits applied for under this Ordinance. However, the Town shall possess the sole right to grant all Special Use Permits.

10. The Town hereby designates the Town Administrator or the Town Administrator's designee as the authority for requests for all Administrative Approvals, i.e. for anything other than a Substantial Modification or a new tower or support structure.

11. Prior to the submission of an application there shall be a pre-application meeting for all intended applications. The pre-application meeting may be held either on site or telephonically as deemed appropriate by the Town Administrator. The purpose of the pre-application meeting will be to address i) issues that will help to expedite the review and permitting process; and ii) specific issues or concerns the Town or the Applicant may have. Costs of the Town's consultant to prepare for and attend the pre-application meeting will be borne by the applicant and paid for out of a fee set forth in the Town's Schedule of Fees, which shall have been paid to the Town prior to any site visit or pre-application meeting or any work related to an intended application preceding the site visit or per-application meeting in excess of one (1) hour related to the application.

12. If there has not been a prior site visit for the requested Facility or Complex within the previous six (6) months a site visit shall be conducted.

13. An Applicant shall submit to the Town the number of completed Applications determined to be needed at the pre-application meeting. If Town action is required, applications will not be transmitted to the Town for consideration until the application is deemed Complete by staff or the Town's expert consultant.

14. If the proposed site is within one (1) mile of another jurisdiction, written notification of the Application shall be provided to the legislative body of all such adjacent jurisdictions as applicable and/or requested.

15. The owner(s) of the support structure to which antennas or related equipment are to be attached must be an official Applicant of Record, unless the owner is the Town, in which case, to prevent a conflict of interest, the Town shall not be a party to the Application.

16. All Applicants shall closely follow the instructions for preparing an Application. Not following the instructions without permission to deviate from such shall result in the application being deemed incomplete and a tolling of the time allowed for action on an Application until a Complete Application is received.

17. Within thirty (30) days of the date of submission of an Application the Applicant shall be notified in writing of any deficiencies related to the completeness of the Application. Remediation of deficiencies in an Application shall be deemed an amendment of the Application that was received.

18. The Town may deny applications not meeting the requirements stated herein or which are otherwise not complete after proper notice and a reasonable opportunity to make the Application Complete has been afforded. Applications will be deemed abandoned if left incomplete for more than ninety (90) days after the date of notice of incompleteness.

19. No work of any kind on or at a Facility or Complex shall be started until the Application is reviewed and approved and the Special Use Permit or Administrative Approval, as applicable, has been issued, and a Building Permit has been issued in accordance with the Town's Code.

20. Any and all representations made by the Applicant or that are made in support of the Application shall be deemed to be on the record, whether written or verbal, and shall be deemed to have been relied upon in good faith by the Town. Any verbal representation shall be treated as if it were made in writing.

21. Other than to remediate non-compliant situations related to matters of safety or the conditions of a permit, no permits for work at a Facility or Complex shall be issued where the Facility or Complex is not in full compliance with all applicable local, State and federal laws, rules, regulations and orders. A Facility or Complex not in full compliance with this Ordinance shall be required to be brought into full compliance before any Permit of any kind will be issued.

22. An Application shall be signed on behalf of the Applicant(s) by a person vested with the authority to bind and commit the Applicant attesting to the truthfulness, completeness and accuracy of the information presented

23. The Applicant must provide documentation to substantiate that it has the right to proceed as proposed on the site or at the Complex in the form of an executed copy of the lease with the landowner or landlord or a signed letter of agency granting authorization. If the applicant owns the Site or Complex, a copy of the ownership record is required.

24. Applications shall include written commitment statements to the effect that:

    a. the applicant's Facility or Complex shall at all times and without exception be maintained in a safe manner, and in compliance with all conditions of all permits, as well as all applicable and permissible local codes, ordinances, and regulations and all applicable Town, State and Federal Laws, rules, and regulations, unless specifically granted relief by the Town in writing; and

    b. the construction of the Facility or Complex is legally permissible, including, but not limited to the fact that the Applicant is licensed to do business in the State.

25. Where a certification is called for in this Ordinance, such certification shall bear the signature and seal of a Professional Engineer licensed in the State.

26. A support structure and any and all accessory or associated structures shall maximize the use of building materials, colors and textures designed to blend with the structure to which it may be affixed and to harmonize with the natural surroundings. This shall include the utilization of stealth or camouflage or concealment technique as may be required by the Town.

27. All utilities at a Complex or site shall be installed underground and in compliance with all Laws, ordinances, rules and regulations of the Town, including specifically, but not limited to applicable electrical codes.

28. At a Facility or Complex needing vehicular access, an access road, parking and turn around space for emergency vehicles shall be provided to assure adequate emergency and service access. Maximum use of existing roads, whether public or private, shall be made to the extent practicable. Road construction shall at all times minimize ground disturbance and the cutting of vegetation. Road grades shall closely follow natural contours to assure minimal visual disturbance and reduce soil erosion. If the current access road or turn around space is deemed in disrepair or in need of remedial work to make it serviceable and safe and in compliance with any applicable regulations as determined at a site visit, the Application shall contain a commitment to remedy or restore the road or turn around space so that it is serviceable and safe and in compliance with applicable regulations.

29. All work at a Facility or Complex shall be done in strict compliance with all current applicable technical, safety and safety-related codes adopted by the Town, State, or United States, including but not limited to the most recent edition of the TIA ANSI Code, National Electric Safety Code, the National Electrical Code, the Occupational and Safety and Health Administration (OSHA) regulations, recommended practices of the National Association of Tower Erectors and accepted and responsible workmanlike industry practices. The codes referred to are codes that include, but are not limited to, construction, building, electrical, fire, safety, health, and land use codes. In the event of a conflict between or among any of the preceding the more stringent shall apply.

30. A holder of a Special Use Permit or Administrative Approval granted authority granted under this Ordinance shall obtain, at its own expense, all permits and licenses required by applicable law, ordinance, rule, regulation or code, and must maintain the same, in full force and effect, for as long as required by the Town or other governmental entity or agency having jurisdiction over the applicant.

31. Unless such is proven to be technologically impracticable, the Town requires the co-location of new antenna arrays on existing structures, as opposed to the construction of a new Complex or support structure or increasing the height, footprint or profile of a Facility or Complex beyond the conditions of the approved Special Use Permit for an existing Facility or Complex. In instances not qualifying as an Eligible Facility, the Applicant shall submit a comprehensive report inventorying all existing structures more than fifty feet (50') in height within one-half (1/2) mile of the location of any proposed new Facility or Complex.

32. An Applicant intending to co-locate on or at an existing Facility or Complex shall be required to document the intent of the existing owner to permit its use by the Applicant.

33. Co-located equipment shall consist only of the minimum Antenna array technologically Needed to provide service primarily and essentially within the Town, to the extent practicable, unless good cause is shown in the form of clear and convincing evidence.

34. A DAS system that is owned or operated by a commercial carrier and is part of a commercial wireless system, or are used for commercial purposes, is expressly included in the context of this Ordinance, regardless of the location or whether the Facility or any of its components is located inside or outside a structure or building.

35. The existence of a lease or an option to lease shall not be deemed justification for not complying with the siting priorities set forth in this Ordinance, as well as other applicable land use and zoning regulations. An Applicant may not by-pass sites of higher siting priority than the priority chosen solely because the site proposed is under lease or an option to lease exists. If a site other than the number 1 priority, or attaching to an existing structure is proposed, the applicant must demonstrate and explain to the reasonable satisfaction of the Town why co-location is technically or commercially impracticable. Contractual or Build-to-Suit agreements between carriers and a proposed Tower owner shall not be a valid basis for any claim of exemption, exception or waiver from compliance with the siting priorities.

36. Any technical information must be provided in such a manner, detail and form that the content and any conclusions are able to be verified by a third party using the information used and provided by the applicant.

37. All costs associated with the preparation and submission of an Application and/or necessitated by the requirements for obtaining and maintaining any and all Town permits shall be borne by the Applicant or Permittee.

38. Any new Wireless Facility shall be designed and constructed so as to be the least visually intrusive, create the least visual impact reasonably possible and have the least negative impact on nearby property values, provided that pursuant to 47 U.S.C. 332(c)(7)(B)(II) compliance with this requirement does prohibit or effectively serve to prohibit the provision of the intended service from one or more Facilities.

39. No new Facility or antenna array shall be identifiable, recognizable or discernable as a Wireless Facility or antenna by a typical lay-person from a distance of two-hundred fifty feet (250') or more.

39. The fact that a proposed use satisfies all specific requirements for a Special Use Permit in a given type of zoning or land use district does not create a presumption that the use is compatible or in harmony with nearby properties within one thousand feet (1,000') and, in itself, is not sufficient to require the grant of a Special Use Permit.

40. Inventory of existing sites. Each applicant for approval of an antenna and/or a tower shall provide to the Town Administrator an inventory of its existing antennas and towers that are within the jurisdiction of the Town of Middletown, including specific information about the location, height and design characteristics of each tower or antenna. Applicants are encouraged to submit an inventory of potential future tower sites within the jurisdiction of the Town of Middletown. The Town Administrator may share such information with other applicants applying for administrative approval under this section or other organizations seeking to locate towers or antennas within the jurisdiction of the governing authority; provided, however, that the Town Administrator is not, by sharing such information, in any way representing or warranting that such sites are available or suitable.

41. Buffering of the site shall be installed to screen and/or mitigate the impacts of the wireless facility on surrounding areas, properties, or rights-of-way. In order to provide spatial separation and create a visual block from adjacent properties and streets, a buffer shall be installed around the outside of all improvements on the site, including the tower, any ground buildings or equipment, and security fencing. Depending upon the specific situation for the location involved and the impact of such, ground-mounted equipment cabinets and buildings may be located outside the buffered area if they are constructed so the exterior appearance of the equipment cabinet or building has the appearance of surrounding structures. The applicant shall submit scaled elevations of such buildings to assist in the evaluation of compliance with this appearance criteria.

Section 5. Responsible Party(s)

With the exception of the Town itself, the owner(s) of a Facility or Complex, any support structure used to accommodate wireless Facilities, and of the land upon which a Facility support structure or Complex is located, shall at all times be jointly and individually responsible for: (1) the clean, neat, non-littered and safe condition of the Facility or Complex, support structure and all components on the site related to the Facility or Complex; (2) assuring that all activities of owners, users, or lessees occurring on the site, and all components on the site related to the Facility or Complex, are at all times in compliance with all applicable laws, ordinances, rules, regulations, orders, and permits related to the Facility or Complex; and (3) assuring the proper permitting as required by this Article and other Town regulations by all lessees and users of the Facility or Complex, including but not limited to any upgrades and/or Modifications of equipment. Said owner(s) shall regularly and diligently monitor activities at the site to assure that the Facility or Complex is operated in compliance with this Ordinance, other Town regulations and any Special Use Permit.

Section 6. Fees

All fees and charges, including but not limited to Application fees, Expert Assistance fees, Inspection fees and Permit fees, shall be as set forth in the Town's Schedule of Fees and Charges. For new towers or other support structures or for substantial modifications, the Expert Assistance fee shall be as set forth in the Town's Fee Schedule. The Town may choose to waive their application fee if the applicant locates on Town Owned property, not including in the Town's public rights-of-ways.

Section 7. Existing Facilities and Complexes

A. Any legally permitted Facility, Tower or other support structure or Complex that exists on the effective date of this Ordinance of the Town's codes shall be allowed to continue as it presently exists, provided that i) all work was properly permitted; ii) the Facility or Complex is in compliance with all applicable local, State and federal laws, rules regulations, orders and permit conditions; iii) the Site is in compliance with the latest version of TIA ANSI 222 as regards the physical condition of the Site; and iv) a Certificate of Completion (COC) was issued for the most recent work performed;

B. Any work not properly previously permitted prior to the adoption of this Ordinance must be properly permitted within ninety (90) days of the effective date of this Ordinance or prior to any Modification of, on or at the site or Facility.

C. Any new Co-location and/or Modification of a Facility, Tower or other support structure or Complex or a Carrier's equipment located on the Tower or Facility, must be permitted under this Ordinance and the entire Facility or Complex and any new Co-location or Modification shall comply with all applicable laws, rules and regulations, including obtaining a valid COC.

Section 8. Certificate of Completion

A. No work shall be allowed to be done at or on any Facility or Complex, excepting normal repair and maintenance work as defined in this Ordinance, for which the owner cannot produce the COC for the most recent work, until a final inspection has been conducted and a COC has been issued. The owner of the Facility, Tower or other support structure or Complex shall pay for the actual cost of the required final inspection prior to the inspection being conducted. If the Facility or Complex does not pass the initial final inspection, the owner shall be required to pay for any subsequent re-inspection prior to the re-inspection being conducted. A passing final inspection is required prior to the issuance of a COC.

B. If no COC can be produced for previously done work, at the discretion of the Town Administrator, per day per violation fines and other penalties as allowed by law maybe imposed until the Facility or Complex is compliant and the required COC has been issued. The time used for the determination of the start date for such fines and penalties shall be thirty (30) days from the date the previously done work was permitted, unless the Applicant can dispositively prove to the contrary.

Section 9. Exclusions

The following shall be exempt from this Ordinance:

A. Any facilities expressly exempt from the Town's zoning, land use, siting, building and permitting authority.

B. Any reception or transmission devises expressly exempted under the Telecommunications Act of 1996.

C. A Facility used exclusively for private, non-commercial radio and television reception and private citizen's bands, licensed amateur radio and other similar non-commercial Telecommunications that is less than 50' above ground level.

D. Facilities used exclusively for providing wireless service(s) or technologies where i) there is no charge for the use of the wireless service; ii) the Facility or Complex does not require a new Tower or increase the height or profile of the structure being attached to; and iii) the service is not intended to be useable more than seventy-five feet (75') from the Antenna.

Section 10. Application Requirements for a New Tower, Support Structure, or a Substantial Modification or Co-location

A. All Applicants for a Special Use Permit for a new Wireless Facility or Complex, including for a new Tower or other new support structure or that constitutes a Substantial Modification, shall comply with the requirements set forth in this Section. In addition to the required information set forth in this Section, all applications for the construction or installation of new Wireless Facility or Complex or Substantial Modification shall contain the information hereinafter set forth prior to the issuance of a Building Permit. Any technical information must be provided in such a manner, form and with such content that it is able to be verified by a third party using the information used and provided by the applicant.

Ownership and Management

1. The Name, address, phone number and e-mail address of the person preparing the Application;
2. The Name, address, phone number and e-mail address of the property owner and the Applicant, including the legal name of the Applicant. If the owner of the structure is different than the applicant, the name, e-mail address and all Necessary contact information shall be provided;
3. The Postal address and tax map parcel number of the property;
4. A copy of the FCC license(s) applicable for the intended use(s) of the Wireless Telecommunications Facilities, including all FCC licensed frequency bands to be used;
5. The Applicant shall disclose in writing any agreement in existence that would limit or preclude the ability of the Applicant to share any new Telecommunication Tower or support structure that it constructs or has constructed for it;

Zoning and Planning

6. The Zoning District or designation in which the property is situated;
7. The size of the property footprint on which the structure to be built or attached is located, stated both in square feet and lot line dimensions, and a survey showing the location of all property lot lines;
8. The location, size of the footprint and height of all existing and proposed structures, enclosures and cabinets on the property on which the structure is located and that are related to the subject of the Application;
9. A site plan to scale, not a hand drawn sketch, showing the footprint of the Support Structure and the type, location and dimensions of access drives, proposed landscaping and buffers in compliance with the Town's Building or Development Code, including but not limited to fencing and any other requirements of site plans;
10. Elevation drawings showing the profile or the vertical rendition of the Tower or support structure at the Facility or Complex and identifying all existing and proposed attachments, including the height above the existing grade of each attachment and the owner or operator of each, as well as all lighting;
11. The type of Tower or support structure, the number of antenna arrays proposed to be able to be accommodated and the basis for the calculations of the Tower's or support structure's capability to accommodate the required number of antenna arrays for which the structure must be designed;
12. Disclosure in writing of any agreement in existence prior to the submission of the Application that would limit or preclude the ability of the Applicant to share any new Telecommunication Tower that it constructs.
13. A certified statement of i) the total cost of construction for the work associated with the Application; and ii) the total cost of all equipment of the Applicant at the Facility. To verify the accuracy of the information, the Town reserves the right to require copies of applicable invoices or other clear and convincing corroborating evidence.

14. the age of the Tower or support structure and Complex stated in years, including the date of the grant of the original permit;
15. a description of the type of Tower, e.g. guyed, self-supporting lattice or monopole, or other type of support structure;
16. for a tower, the make, model, type and manufacturer of the Tower and the structural design analysis and report, including the calculations, certified by a Professional Engineer licensed in the State, proving the Tower or support Structure's capability to safely accommodate the Facilities of the Applicant without change or Modification.
17. if a Substantial Co-location, change or Modification of a Facility or Complex is needed, a detailed narrative explaining what changes are needed and why they are needed;
18. a Complete, unredacted copy of the foundation design and report for the Tower or other structure, including a geotechnical sub-surface soils investigation report and foundation design for the Facility;
19. if Substantially Modifying or Co-locating on an existing Tower or other support structure, a Complete, unredacted and certified TIA ANSI 222 Report regarding the physical condition of the Complex and all of its components done within the previous six (6) months. If such report has not been done within the previous six (6) months, one shall be done and submitted as part of the Application. No Building Permit shall be issued for any Wireless Facility or related equipment where the structure being attached to is in need of remediation to comply with the requirements of this subsection and other adopted standards of the Town regarding the physical condition and/or safety of the Facility, unless and until all remediation work that is deemed needed has been completed, or a schedule for the remediation work has been approved by the Town Administrator;
20. In an instance involving a Tower with only a single array of antennas, or for the first antenna array to be attached to a Tower where the array will be thirty-three feet (33') or more above ground level, and not within 100 feet of areas to which the public has or could reasonably have or gain access to, in lieu of a full RF emissions study, if deemed appropriate by the Town, signed documentation in the form of the FCC's "Checklist to Determine whether a Facility may be Categorically Excluded" may in certain cases be allowed to be used and shall be provided to verify that the Facility and Complex with the proposed installation will be in full compliance with the current FCC's RF Emissions regulations;
21. In certain instances, the Town may deem it appropriate to have a post-construction on-site RF survey of the Facility or Complex done after the construction or Modification and activation of the Facility or Complex, such to be done under the direction of the Town or its designee, and an un-redacted copy of the survey results provided, along with all calculations, prior to issuance of a Certificate of Compliance. Such study shall reflect the cumulative effects, readings or levels of all active RF equipment at the Site;
22. In the event the Town deems it necessary to determine compliance with the FCC's Maximum Permitted Exposure (MPE) rules, and in lieu of the procedure contained in the preceding §A, (21) of this Section, the Town expressly reserves the right to request the involvement of the FCC and/or OSHA (Occupational Safety and Health Administration) to determine or verify compliance with federal standards and guidelines that the Town, itself, may be prohibited from determining.
23. If not submitted in a previous application, a signed statement that the Applicant will expeditiously remedy any physical or RF interference with other telecommunications or wireless devices or services.

B. A written copy of an analysis completed by a qualified individual or organization to determine if the proposed Wireless Telecommunications Facility or Complex is in compliance with Federal Aviation Administration Regulation Part 77, and if it requires lighting, including any Facility or Complex where the application proposes to increase the height of the existing Tower or support structure.

C. New Towers shall be prohibited on private property in Residential Districts, Historic Districts and areas officially deemed to be visual or sensitive scenic areas within the Town's Corporate Limits.

D. All Applications for a proposed Facility or Complex applicable to this Section shall contain clear and convincing evidence that the Facility or Complex is sited and designed so as to create the least visual intrusiveness reasonably possible given the facts and circumstances involved. To achieve this goal the Town expressly reserves the right to require the use of Stealth or Camouflage siting techniques such as, but not limited to, DAS (Distributive Antenna System), a Small Cell Facility or a functional equivalent as regards size, and such shall be subject to approval by the Town.

E. If proposing a new Tower or support structure, or a Substantial Co-location or Modification of an existing structure, the Applicant shall be required to submit clear and convincing evidence that there is no alternative solution within the search ring of the proposed site that would be less visually intrusive and that not to permit the proposed new Tower or support structure, or a Substantial Co-location or Modification would result in the prohibition of service or the perpetuation of a significant gap in service.

F. An Applicant proposing a new Tower or support structure shall use the largest search ring technically possible, and may be required to prove with certified technical/engineering documentation that the search ring used is the largest that could be used.

G. In order to better inform the public, in the case of a new Tower or support structure or Substantial Modification, the applicant shall hold a "balloon test" prior to the initial public hearing on the application. The Applicant shall arrange to fly, or raise upon a temporary mast, a minimum of a ten (10) foot in length brightly colored balloon with horizontal stabilizers, at the maximum height of the proposed new Tower or support structure or Substantial Modification. Unless conditions at the time preclude it for reasons of instability vis-à-vis wind speed, the use of spherical balloons shall not be permitted.

H. At the option of the Town Administrator, a community meeting may be held concurrent with the balloon test, the notification of which shall be as set forth in the following §I(4).

I. At least fourteen (14) days prior to the conduct of the balloon test, a sign shall be erected so as to be clearly visible from the road nearest the proposed site and shall be removed no later than fourteen (14) days after the conduct of the balloon test. The sign shall be at least four feet (4') by eight feet (8') in size and shall be readable from the road by a person with 20/20 vision.

1. Such sign shall be placed off, but as near to, the public right-of-way as is possible.

2. Such sign shall contain the times and date(s) of the balloon test and contact information.

3. The dates, (including a second date, in case of poor visibility or wind in excess of 15 mph on the initial date) times and location of this balloon test shall be advertised by the Applicant seven (7) and fourteen (14) days in advance of the first test date in a newspaper with a general circulation in the Town and as agreed to by the Town. The Applicant shall inform the Town in writing, of the dates and times of the test, at least fourteen (14) days in advance. The balloon shall be flown for at least four (4) consecutive hours between 10:00 am and 2:00 p.m. on the dates chosen. The primary date shall be on a week-end, but the second date, in case of poor visibility on the initial date, may be on a week day. A report with pictures from various locations of the balloon shall be provided with the application.

4. The Applicant shall notify all property owners and residents located within one-thousand five hundred feet (1,500) of the nearest property line of the subject property of the proposed construction of the Tower and Facility or Complex and of the date(s) and time(s) of the balloon test. Such notice shall be provided at least fourteen (14) days prior to the conduct of the balloon test and shall be delivered by first-class mail. The Town Administrator shall be provided an attested copy of the list of addresses to which notification is provided. The Wireless Telecommunications Facility or Complex shall be structurally designed to accommodate at least four (4) Antenna Arrays, with each array to be flush mounted or as close to flush-mounted as is reasonable possible.

J. The Applicant shall provide certified documentation in the form of a structural analysis and report certified by a licensed Professional Engineer, including all calculations, showing that the Facility or Complex will be constructed to meet all local, state and federal structural requirements for loads, including wind and ice loads and including, but not limited to all applicable ANSI (American National Standards Institute) TIA 222 guidelines. In the event of a conflict the more stringent standards shall apply.

K. The Applicant shall furnish a Visual Impact Assessment, which may be required to include:

1. a computer generated "Zone of Visibility Map" at a minimum of a one-mile radius from the proposed structure shall be provided to illustrate locations from which the proposed installation may be seen, with and without foliage; and

2. To-scale photo simulations of "before and after" views from key viewpoints inside of the Town as may be appropriate and required, including but not limited to state highways and other major roads, state and local parks, other public lands, historic districts, preserves and historic sites normally open to the public, and from any other location where the site is visible to a large number of visitors, travelers or residents. Guidance will be provided concerning the appropriate key viewpoints at the pre-application meeting. In addition to photographic simulations to scale showing the visual impact, the applicant shall provide a map showing the locations of where the pictures were taken and the distance(s)of each location from the proposed structure;

L. The Applicant shall provide a written description and a visual rendering demonstrating how it shall effectively screen from view at least the bottom fifteen feet (15') of the Facility or Complex and all related equipment and structures associated with the Facility or Complex.

M. A Building Permit shall not be issued for the construction of a new Tower or other support structure until i) there is an Application filed for or by a specific carrier that documents with verifiable technical evidence that the Facility or Complex is Necessary for that carrier to serve the community and that co-location on an existing Structure is not feasible, or ii) that no owner of an existing structure within the Applicant's search ring will allow attachment to the owner's building or other type of structure.

N. Co-location on an existing structure is not reasonably feasible if such is technically or Commercially Impracticable or the owner of the Structure is unwilling to enter into a contract for such use at a fair and reasonable price. If an Applicant feels the price is unreasonable, sufficient documentation in the form of clear and convincing evidence to support such a claim shall be submitted to determine whether co-location on a given existing structure is Commercially Impracticable or otherwise unreasonable.

Section 11. Requirements for Eligible Facility Co-locations or Modifications

A. For the co-location, modification or upgrade of a wireless facility that qualifies as an Eligible Facilities request under applicable law, the following information shall be required to be contained in an application. Any technical information must be provided in such a manner, form and with such content that it is able to be verified by a third party using the information used and provided by the applicant.

Safety

1) the age of the Tower or other support structure in years, including the date of the grant of the original permit;
2) a description of the type of Tower, e.g. guyed, self-supporting lattice or monopole, or a description of another other type of support structure;
3) certified documentation in the form of a structural analysis and report done by a Professional Engineer licensed in the State of Maryland. Said analysis and report shall include all supporting calculations, showing that the Facility, as it exists, will meet all local, state and federal structural requirements for loads, including wind and ice loads and including, but not

limited to, the Maryland Building Code and all applicable ANSI (American National Standards Institute) TIA 222 guidelines. In the event of a conflict, the more stringent shall apply.

4) a copy of i) the installed foundation design, including a geotechnical sub-surface soils investigation report; and if necessary ii) a foundation remediation design and recommendation for the Tower or other structure;
5) a certified, unredacted report and supporting documentation, including photographs, regarding the physical situation and physical condition of all equipment and facilities at the site in the form of a report based on an on-site inspection done pursuant to and in compliance with the latest version of TIA/ANSI 222. The inspection shall be done by a qualified individual experienced in performing such inspections and the report shall be signed by an individual with authority to order any needed remediation or resolution of issues.
6) a copy of the FCC licenses for each frequency band applicable for the intended use of the Wireless Telecommunications transmission and/or receive equipment;
7) a list of all frequencies, to be used at the Facility;
8) the number, type and model of the Antenna(s) proposed, along with a copy of the manufacturer's specification sheet(s), i.e. cut sheet(s), for the antennas;
9) certification from the owner of the Facility certifying that the Facility and all attachments thereto are currently in compliance with the conditions of the approved Special Use Permit or Administrative Approval or identifying any non-compliant situation.

Ownership and Management

10) the Name, address and phone number of the person preparing the Application;
11) the Name, address, and phone number of the property owner and the Applicant, including the legal name of the Applicant. If the owner of the structure is different than the applicant, the name and all Necessary contact information shall be provided;
12) the Postal address and tax map parcel number of the property;
13) a copy of the FCC license applicable for the intended use of the Wireless Telecommunications Facilities.

Construction

14) The total cost of construction showing the cost of labor all new and/or replacement components and equipment.

B. In certain instances, the Town may deem it appropriate to have an on-site RF survey of the facility performed after the construction or Modification and activation of the Facility, such to be done under the direction of the Town or its designee, and an un-redacted copy of the survey results provided, along with all calculations, prior to issuance of a Certificate of Compliance. Such study shall reflect the cumulative effects, readings or levels of all active RF equipment at the Site;

C. In the event the Town deems it necessary to determine compliance with the FCC's Maximum Permitted Exposure (MPE) rules, and in lieu of the procedure contained in the previous §B of this Section, the Town expressly reserves the right to seek the involvement of the FCC and/or OSHA (Occupational Safety and Health Administration) to determine or verify compliance with federal standards and guidelines that the Town, itself, may be prohibited from determining.

E. Attachments to Existing Structures Other Than Towers

1) Attachments to Buildings: To preserve and protect the nature and character of the area and create the least visually intrusive impact reasonably possible under the facts and circumstances, any attachment to a building or other structure with a facie, the antennas shall be mounted on the facie without increasing the height of the building or other structure, unless it can be proven that such will prohibit or have the effect of prohibiting the provision of service, and all such attachments and exposed cabling shall use camouflage or stealth techniques to match as closely as possible the color and texture of the structure.

2) Utility poles and light standards: If attaching to a utility pole or light standard, no equipment may extend more than ten percent (10%) of the existing height beyond the top of the structure as originally permitted, and no equipment other than cabling shall be lower than fifteen feet (15') above the ground. Only one (1) increase of the height of a utility pole or light standard shall be allowed.

3) Attachments to Water Tanks: If attaching to a water tank, in order to maintain the current profile and height, mounting on the top of the tank or the use of a corral shall only be permitted if the Applicant can prove that to locate elsewhere less visually on the tank will prohibit or have the effect of prohibiting the provision of service or that to do so would be technologically impracticable.

4) Profile: So as to be the least visually intrusive and create the smallest profile reasonably possible under the facts and circumstances involved, and thereby have the least adverse visual effect, all antennas attached shall be flush mounted or as near to flush mounted as is possible, unless it can be proven that such would prohibit or serve to prohibit the provision of service or be technologically impracticable.

Section 12. Location of Wireless Telecommunications Facilities

A. No tower or other new support structure taller than 35' shall be permitted in any existing or planned (i.e. platted) residential neighborhood, nor within one-half mile of any existing or planned (i.e. platted) residential neighborhood. Said height limit shall not be as-of-right, but shall be the maximum permissible height subject to the verifiable proof-of-technical need information submitted.

B. If a new telecommunications support structure is proposed to be located within one-half mile of an existing or planned residential neighborhood and is proven by verifiable clear and convincing technical information to be a Technical Necessity for the Applicant's service to be provided in the intended service area of the proposed facility, irrespective of the type of zoning, the support structure shall not be taller than ten feet (10') above the tallest obstruction between the proposed support structure and a residential neighborhood.

C. Applicants shall locate, site and erect all Facilities and associated equipment in accordance with the following priorities, in the following order:

1. On existing structures without increasing the dimensions or size of the structure;
2. On existing structures, more than one thousand feet from the nearest boundary of the public right-of-way without increasing the height or size of the profile of the Tower or structure by more than is allowed for an Eligible Facility.
3. On existing structures without increasing the height of the structure by more than is Needed, as such Need can be proven by clear and convincing verifiable technical evidence.
4. On properties in areas zoned for Commercial use.
5. In designated Renaissance or Historic Districts in the public right-of-way, but without increasing the height or size of the profile of the support structure, and only if Camouflaged or Stealthed to the satisfaction of the Town Administrator.
6. In areas zoned for Residential use, in the public right-of-way, but without increasing the height of the size or dimensions of the support structure, and only if Camouflaged or Stealthed to the satisfaction of the Town Administrator.

D. If the applicant proposes and commits to locate on Town-owned property or structures, the Town reserves the right to waive the Town's Application Fee that would otherwise be paid to the Town.

E. If the proposed site is not proposed for the highest priority listed above, then a detailed narrative and technical explanation shall be provided as regards why a site from all higher priority designations was not selected. The person seeking such an exception must demonstrate to the satisfaction of the Town the reason or reasons why a Special Use Permit or Administrative Approval should be granted for the proposed Facility.

F. Notwithstanding anything else to the contrary, the Town may approve any site located within an area in the above list of priorities, provided that the Town finds that the proposed site is in the best interest of the health, safety and welfare of the Town and its inhabitants and will not have a deleterious effect on the nature and character of the community and neighborhood. The Town may also direct that the proposed location be changed to another location that is more in keeping

with the goals of this Ordinance and the public interest as determined by the Town and that serves the intent of the Applicant.

G. Notwithstanding that a potential site may be situated in an area of highest priority or highest available priority, the Town may disapprove an Application for any of the following reasons:

1. Conflict with safety and safety-related codes and requirements, including but not limited to setback and Fall Zone requirements;
2. Non-Compliance with zoning or land use regulations;
3. The placement and location of a Facility or Complex would create an unacceptable risk, or the reasonable possibility of such, to any person or entity for physical or financial damage, or of trespass on private property;
4. The placement and location of a Facility or Complex would result in a conflict with, compromise in or change in the nature or character of the adjacent and surrounding area, and expressly including but not limited to loss in value as measured over the twelve (12) months preceding the Application having been filed;
5. Conflicts with the provisions of zoning or land use regulations;
6. Failure to submit a Complete Application within sixty (60) days after proper notice and opportunity to make the Application Complete.

H. Notwithstanding anything to the contrary in this Ordinance, for good cause shown such as the ability to utilize one or more shorter, smaller or less intrusive Facilities elsewhere and still accomplish the primary service objective, the Town may require the relocation of a proposed site if relocation could result in a less intrusive Facility or Complex singly or in combination with other locations, including allowing for the fact that relocating the site chosen by the Applicant may require the use of more than one (1) Facility to provide substantially the same service.

I. Telecommunication towers shall be permitted in the TC (Town Commercial), GC (General Commercial), SC/LM (Service Commercial/Light Manufacturing), and OS (Open Space) zoning districts only, and comply with the maximum permitted height.

Section 13. Type and Height of Towers

A. No new Towers of a lattice or guyed type shall be permitted.

B. Except in the public rights-of-way and in Residentially zoned areas, the maximum permitted total height of a new tower or other proposed support structure, shall be one hundred feet (100') above pre-construction ground level, unless it can be shown by clear and convincing verifiable technical evidence from a carrier who has committed to use the tower that such height would prohibit or have the effect of prohibiting the provision of service in the intended service area within the Town. The maximum permitted height is permissive and is expressly not as-of-right.

C. The policy decision has been made that more Facilities of a shorter and less intrusive height is in the public interest, as opposed to fewer but taller support structures. Therefore, spacing or the distance between Facilities shall be such that the service may be provided without exceeding the maximum permitted height.

D. If proposed to be taller than the maximum permitted height, the Applicant for a new Tower or support structure shall submit clear and convincing verifiable technical evidence by a carrier or wireless service provider that has committed to use the Tower or other support structure justifying the total height requested. Technical evidence must be verifiable using the information provided by the Applicant. If the Applicant chooses to provide evidence in the form of propagation studies, to enable verification of the Need for the requested height or location, such must include all modeling information and support data used to produce the studies at the requested height and at a minimum of ten feet (10') lower. The Town or its designee will provide the form that shall be used for providing the modeling information.

E. The Town reserves the right to require a drive test to be conducted under the supervision of the Town or its designee to verify the technical Need for what is requested.

F. At no time shall a Tower or other support structure be of a height that requires lighting by the FAA.

G. Towers shall be structurally designed to support a minimum of four (4) carriers using functionally equivalent equipment to that used by the first carrier attaching to a Tower or other support structure, so that the height can be increased if Needed.

H. New structures within Rights-of-Ways – Required Design Characteristics. Pursuant to the Town's Right-of-Way regulations, the following shall govern new poles and other support structures in the Rights-of-Way.
   a. Wireless installations shall be consistent throughout the City limits and the extraterritorial jurisdiction (ETJ);
   b. Wireless installations shall be on inert, non-conductive poles or structures;
   c. All antennas shall not be easily recognizable as an antenna by an average person from 250 feet away;
   d. Wireless installations shall utilize a "concealed" design, including all cabling being inside a hollow pole;
   e. All radios, network equipment and batteries will be enclosed in a pedestal cabinet near the pole, or in a pole-mounted cabinet or under a pole-mounted shroud or other location deemed appropriate under the facts and circumstance that is not technologically impracticable;
   f. Cabinets, if used, should be consistent in size and no larger than standard DOT streetlight signal cabinets;
   g. Unless proven unfeasible by *clear and convincing evidence*, in lieu of installing new poles, any wireless installation in the PROW shall replace a pre-existing distribution pole, secondary pole or streetlight;
   h. Wireless installations shall be on poles that meet or exceed current NESC standards and wind and ice loading requirements of ANSI 222 Version G; and
   i. To avoid unsightly rust and corrosion, any new or replacement pole installed shall not be made of metal or concrete.

Section 14. Visibility and Aesthetics

A. No Tower, nor any support structure that is not a building and is constructed after the effective date of this Section, shall be tall enough to require lighting by the FAA.

B. Stealth: All new Facilities, including but not limited to Towers, shall utilize Stealth or Camouflage siting techniques that are acceptable to the Town, unless such can be shown to be either Commercially or technologically Impracticable.

C. Finish/Color: Towers shall be galvanized and/or painted with a rust-preventive paint of an appropriate color to harmonize with the surroundings and shall be maintained in accordance with the requirements of this Ordinance.

D. Lighting: Notwithstanding the prohibition of lighting, in the event lighting is subsequently required by the FAA, the Applicant shall provide a detailed plan for sufficient lighting of as unobtrusive and inoffensive an effect as is permissible under State and Federal regulations. For any Facility or Complex for which lighting is required under the FAA's regulations, or that for any reason has lights attached, all such lighting shall be affixed with technology that enables the light to be seen as intended from the air, but that prevents the ground scatter effect so that it is not able to be seen from the ground to a height of at least 20 degrees vertical for a distance of at least 1 mile in a level terrain situation. Such device shall be compliant with or not expressly in conflict with FAA regulations. A physical shield may be used, as long as the light is able to be seen from the air, as intended by the FAA.

E. Retrofitting: In the event a Tower or other support structure that is lighted as of the effective date of this Ordinance is modified, at the time of the first Modification of the Facility the Town reserves the right to require that the Tower be retrofitted so as to comply with the lighting requirements of the preceding §(D) of this Section or be reduced to a height that does not require lighting.

F. Flush Mounting: Except for omni-directional antennas, all new or replacement antennas, shall be flush-mounted or as close to flush-mounted on the support structure as is functionally possible, unless it can be demonstrated by clear and convincing technical evidence that such has the effect of prohibiting the provision of service to the intended service area, alone or in combination with another site(s), or unless the Applicant can prove that it is technologically impracticable.

G. Placement on Building: If attached to a building, all antennas shall be mounted on the fascia of the building and camouflaged so as to match the color and, if possible, the texture of the building, or in a manner so as to make the antennas as visually innocuous and undetectable as is reasonably possible given the facts and circumstances involved.

Section 15. Security

All Facilities shall be located, fenced or otherwise secured in a manner that prevents unauthorized access. Specifically:

A. All Facilities, including Antennas, Towers and other supporting structures, such as guy anchor points and guy wires, shall be made inaccessible to unauthorized individuals and shall be constructed or shielded in such a manner that they cannot be easily climbed or collided with and shall expressly include removing the climbing steps for the first ten feet (10') from the ground on a monopole; and

B. Transmitters and Telecommunications control points shall be installed so that they are readily accessible only to persons authorized to operate or service them.

Section 16. Signage

Facilities shall contain a sign no larger than four (4) square feet and no smaller than two (2) square feet in order to provide adequate warning to persons in the immediate area of the presence of RF radiation. A sign of the same size is also to be installed bearing the name(s) of the owner(s) and operator(s) of the Antenna(s) as well as emergency phone number(s). The sign shall be on the equipment shelter or cabinet of the Applicant and must be visible from the access point of the Facility or Complex and must identify the equipment owner of the shelter or cabinet. On Tower sites, an FCC registration sign, as applicable, is also to be present. The signs shall not be lighted, unless applicable law, rule or regulation requires lighting. No other signage, including advertising, shall be permitted.

Section 17. Setback and Fall Zone

A. All proposed Towers and any other proposed Wireless support structures, except in the right-of-way, shall be set back from abutting parcels, recorded rights-of-way and roads and streets by the greater of the following distances: i) a distance equal to the height of the proposed Tower or support structure plus ten percent (110%) of the height of the Tower or other structure, otherwise known as the Fall Zone; or ii) the existing setback requirement of the underlying zoning district, whichever is greater.

B. For any Facility located within a fenced compound, any Accessory structure shall be located within the fenced compound as approved in the Special Use Permit and so as to comply with the applicable minimum setback requirements for the property on which it is situated. The Fall Zone or setback shall be measured from the nearest portion of the tower to the nearest portion of the right-of-way of any public road or thoroughfare and any occupied building or domicile, as well as any property boundary lines.

C. The nearest portion of any private access road leading to a Facility shall be no less than ten (10) feet from the nearest property line.

D. There shall be no development of habitable buildings within the Setback area or Fall Zone.

Section 18. Retention of Expert Assistance Cost to be Borne by Applicant

A. Since retail subscriber rates reflect all capital costs, including costs of permitting such as but not limited to payment of the cost of the Town's expert assistance, and to prevent taxpayers from having to bear the cost related to the issue of permitting and regulating a commercially used Wireless Telecommunications Facilities or negotiating agreements to lease or amend or modify a lease for any Town-owned property or structure, an Applicant shall pay to the Town fees as set forth in the Town's Fee Schedule. The fees are intended to cover all reasonable costs of the expert assistance needed by the Town in connection with the review of any Application, including both the technical and non- technical review, and the permitting, inspection, construction or Modification requested, any Application pre-approval evaluation requested by the Applicant and any lease negotiations. The payment of the Expert Assistance fees to the Town shall precede any work being done that is related to the intended Application or lease, including a pre-application meeting or site visit.

B. The Town may hire any consultant of its choice to assist the Town in reviewing and evaluating Applications and negotiating leases, provided the consultant has at least five (5) years of experience working exclusively for the public sector regulating Towers and Wireless Facilities and negotiating leases, and has not had a recommendation successfully legally challenged.

C. The total amount of the funds needed for expert assistance as set forth in the Town's Fee schedule may vary with the scope and complexity of the Application, the completeness of the Application and other information as may be needed to complete the necessary technical and non-technical reviews, analysis and inspection of any construction or Modification or the amount of time spent responding to an Applicant's arguments as regards its Application as relates to the requirements of this Ordinance.

D. For a new Tower or support structure or a Substantial Modification, to prevent taxpayer subsidization, the expert assistance fee shall be no less than $7,500.

E. The Town will maintain an accounting record for the expenditure of-all such funds.

F. If an Application is Amended, or a waiver or relief is requested from any regulations at any time prior to the grant of the Certificate of Completion required under this Ordinance, the Town reserves the right to require additional payment for the review and analysis equal to, but not exceeding, the cost created for the Town by the Applicant or its Application. Such amount shall be paid to the Town prior to the issuance of the Special Use Permit or Administrative Approval or the Certificate of Completion, whichever is procedurally needed next.

Section 19. Procedural Requirements for a Granting a Special Use Permit

A. When a Special Use Permit is requested, the following procedures shall apply.

B. When deemed necessary or otherwise in the public interest, as part of the process for any new Towers or Telecommunications Support Structure, the Town may require a Neighborhood Meeting with area residents, the Applicant, a representative(s) from the Town staff and the Town's consultant to discuss the proposed Facility and the effects of such.

C. The Town shall schedule any required public hearing(s) once it finds the Application is Complete and there are no issues of non-compliance or conflict with applicable law, rule or regulation. The Town shall not be required to set a date for a hearing if the Application is not

Complete or if there are unresolved issues of non-compliance by the Applicant or a party to the Application. The Town may, at any stage prior to issuing a Special Use Permit or Administrative Approval, require such additional information as it deems Necessary and that is not expressly prohibited from being required by applicable law as relates to the issue of the siting, construction or Modification of or at a Wireless Telecommunications Facility or Complex.

D. Upon Town approval, a Special Use Permit shall be issued for a new Tower or Substantially Modified Wireless Support Structure or Substantial Co-location. Notwithstanding the preceding, the Building Permit for a new Tower or other proposed support structure shall not be issued until an Applicant has provided clear and convincing substantiating documentation governing the placement of the first antenna array of a carrier who has committed to use the structure prior to its construction and that carrier has been properly permitted under this Ordinance.

Section 20. Action on an Application

A. The Town will undertake, or have undertaken, a review of an Application pursuant to this Article in a timely fashion, consistent with its responsibilities and applicable law, and shall act within the time required by applicable law.

B. The Town may refer any Application or part thereof to any advisory committee or consultant for a non-binding recommendation.

C. Either after the public hearing if a hearing is required, or after Administrative review for an Eligible Facility Application, and after formally considering the Application, the Town may i) approve; ii) approve with conditions; or iii) deny for cause a Permit or Administrative Approval Application. The decision shall be in writing and shall be supported by substantial evidence contained in a written record, which record may be the minutes of any or all official meetings. Throughout the Application and permitting process, the burden of proof for compliance with this Ordinance or the need for a waiver or relief shall always be upon the Applicant.

D. An Applicant shall not be permitted to refuse to provide information needed to establish the substantial written record required under federal law and applicable case law. Refusal for more than sixty days without agreement by the Burgesses shall result in denial of the Application or the Application shall be deemed abandoned.

E. Approval Notification: If the Town approves the Special Use Permit or Administrative Approval, then the Applicant shall be notified of the approval of its Application, including any conditions, within 30 calendar days of the Town's action. The Special Use Permit or Administrative Authorization shall be issued within thirty (30) days after such approval.

F. Denial Notification: If denied, the Applicant shall be notified of the denial of its Application at the Town Meeting, and in writing within 30 calendar days of the Town's action, which notice shall contain the reason or reasons for the denial.

Section 21. Transfer or Assignment

The extent and parameters of a Special Use Permit or Administrative Authorization for a Facility or Complex shall be as follows:

A. Such Special Use Permit or Administrative Authorization shall not be assigned, transferred or conveyed without the express prior written notification to the Town, such notice to be not fewer than thirty (30) business days prior to the intended assignment, transfer or conveyance.

B. A transfer, assignment or other conveyance of the Special Use Permit or Administrative Authorization shall require the written commitment of the proposed new holder of the Special Use Permit or Administrative Authorization to abide by all applicable laws, rules and regulations, including but not limited to this Ordinance.

Section 22. Violations

A. Following written notice of violation and an opportunity to cure, any Permit or Administrative Approval granted under this Ordinance may be revoked, canceled, or terminated for a violation of the uncured conditions and provisions of the Special Use Permit or other applicable law, rule, regulation or order, and if warranted the payment of a fine(s) as is permissible.

B. If not cured within the time frame set forth in the Notice of Violation, a hearing shall be held upon thirty (30) days prior notice to the Applicant citing the violation and the date, time and place of the hearing, which shall be provided by registered mail to the last known address of the holder of the Special Use Permit.

C. Following the original notice and an opportunity to cure, subsequent or repeated violations of a substantially similar nature shall not require an opportunity to cure prior to the imposition of fines or penalties.

Section 23. Removal and Performance Security

A. Removal and Performance: The Applicant and the owner of record of any proposed new Tower or other support structure or Complex shall, at its sole cost and expense, be required to execute and file with the Town a bond or other form of security that is acceptable to the Town as to the type of security and the form and manner of execution, in an amount of at least $75,000.00 for a Tower or other support structure and with such sureties as are deemed adequate by the Town to assure the faithful performance of the terms and conditions of this Ordinance and the conditions of any Special Use Permit issued pursuant to this Ordinance. The full amount of the bond or security shall remain in full force and effect throughout the term of the Special Use Permit and/or, if abandoned, until any necessary site restoration is completed to restore the site to a condition comparable to that, which existed prior to the issuance of the original Special Use Permit. The amount of the Bond is, in part, determined by the current cost of demolition, removal and site restoration multiplied by the compounding or cumulative effect of a three percent (3%) annual cost escalator over a thirty (30) year projected useful life of the structure.

B. Performance: The owner of any equipment attached to a support structure or located in a Complex shall be required to execute and file with the Town a performance bond or other form of performance security that is acceptable to the Town as to the type of security and the form and manner of execution, in the amount of $25,000.

Section 24. Reservation of Authority to Inspect Wireless Telecommunications Facilities

A. In order to verify that the holder of a Special Use Permit for a Facility or Complex and any and all lessees, renters, and/or licensees of Wireless Telecommunications Facilities, places, constructs and maintains such facility in accordance with all applicable technical, safety, fire, building codes, zoning codes, laws, ordinances and regulations and conditions of any permit granted under this Ordinance, the Town or its designee shall have the right to inspect all facets of said permit holder's, renter's, lessee's or licensee's placement, construction, Modification and maintenance of such facilities, including, but not limited to, Towers, Antennas, buildings and equipment and connections contained therein, or other structures constructed or located on the permitted site.

B. Refusal to allow or grant access to the Town's representative upon reasonable notice shall be deemed a violation of this ordinance.

Section 25. Liability Insurance

A. A holder of a Special Use Permit for a Wireless Telecommunications Support Structure shall secure and at all times maintain public liability insurance for personal injuries, death and property damage, and umbrella insurance coverage, for the duration of the Special Use Permit in amounts as set forth below:

1. Commercial General Liability covering personal injuries, death and property damage: $2,000,000 per occurrence/$5,000,000 aggregate; and
2. Automobile Coverage: $1,000,000.00 per occurrence/ $3,000,000 aggregate; and
3. A $5,000,000 Umbrella coverage; and
4. Workers Compensation and Disability: Statutory amounts.

B. For a Facility or Complex located on Town property, the Commercial General Liability insurance policy shall specifically name the Town and its officers, Boards, employees, committee members, attorneys, agents and consultants as additional insureds.

C. The insurance policies shall be issued by an agent or representative of an insurance company licensed to do business in the State and with an AM Best's rating of at least A.

D. The insurance policies shall contain an endorsement obligating the insurance company to furnish the Town with at least thirty (30) days prior written notice in advance of the cancellation of the insurance.

E. Renewal or replacement policies or certificates shall be delivered to the Town at least fifteen (15) days prior to the expiration of the insurance that such policies are intended to renew or replace.

F. Before construction of a permitted Wireless Telecommunications Facility or Complex is initiated, but in no case later than fifteen (15) days prior to the grant of the Building Permit, the holder of the Special Use Permit shall deliver to the Town a copy of each of the policies or certificates representing the required insurance in the required amounts.

G. A Certificate of Insurance that states that it is for informational purposes only and does not confer rights upon the Town shall not be deemed to comply with this Section.

Section 26. Indemnification

A. Any application for Wireless Telecommunication Facilities that is proposed to be located on Town property shall contain a signed statement fully and completely indemnifying the Town. Such provision shall require the applicant, to the extent permitted by applicable law, to at all times defend, indemnify, protect, save, hold harmless and exempt the Town and its officers, Boards, employees, committee members, attorneys, agents, and consultants from any and all penalties, damages, costs, or charges arising out of any and all claims, suits, demands, causes of action, or award of damages, whether compensatory or punitive, or expenses arising there from, either at law or in equity, which might arise out of, or are caused by, the placement, construction, erection, Modification , location, products performance, use, operation, maintenance, repair, installation, replacement, removal, or restoration of said Facility or Complex. Notwithstanding the preceding, there shall be no claim of indemnification with respect to any act attributable to the negligent or intentional acts or omissions of the Town, or its servants or agents. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, and expert witness fees are included in those costs that are recoverable by the Town.

B. Notwithstanding the requirements noted in subsection A of this section, an indemnification provision will not be required in those instances where the Town itself, or an agency or department of the Town, applies for and secures a Special Use Permit for a Wireless Telecommunications Facility or Complex.

Section 27. Fines

A. In the event of a violation of this Ordinance, or any Special Use Permit or Administrative Approval issued pursuant to this Ordinance, the Town may impose and collect, and the holder of the Special Use Permit or Administrative Approval for a Wireless Telecommunications Facility or Complex shall pay to the Town, fines or penalties as set allowed by State law or as otherwise established by the Town.

B. Notwithstanding anything in this Ordinance, the holder of the Special Use Permit or Administrative Approval for a Facility or Complex may not use the payment of fines, liquidated damages or other penalties, to evade or avoid compliance with this Section or any section of this Ordinance. An attempt to do so shall subject the holder of the Special Use Permit to termination and revocation of the Special Use Permit in addition to the payment of fines. The Town may also seek injunctive relief to prevent the continued violation of this Ordinance without limiting other remedies available to the Town.

Section 28. Default and/or Revocation

If a support structure, Facility or Complex is repaired, rebuilt, placed, moved, re-located, modified or maintained in a way that is inconsistent or not in compliance with the provisions of this Ordinance or of the Special Use Permit or Administrative Approval, then the Town shall notify the holder of the Special Use Permit or Administrative Approval in writing of such violation. A Permit or Administrative Approval holder found to be in violation may be considered in default and subject to fines as permitted under applicable State law, and if a violation is not corrected to the satisfaction of the Town in a reasonable period of time the Special Use Permit or Administrative Approval shall be subject to revocation.

Section 29. Moving or Removal of Co-located Facilities and Equipment

A. If attached to an existing tower or other support structure, unless the Town deems doing so to be in the public interest, it shall be impermissible for a wireless service provider's or carrier's equipment to be relocated from one structure to another without clear and convincing evidence that not to do so would, for technical reasons, prohibit or serve to prohibit the provision of service in the service area served by the existing wireless facility.

B. If the lease for the existing attachment and use expires and is not renewed, thereby forcing the facility to be moved, such move shall be allowed upon i) the provision of clear and convincing evidence satisfactory to the Town of the need to move or relocate the facility; and ii) clear and convincing evidence satisfactory to the Town of the lack of impact on the neighborhood or area of the intended new location. Cancellation or abandonment of a lease by a lessee or refusal to agree to terms of a lease that are not Commercially Impracticable shall not be deemed a permissible reason for relocating.

C. The owner of any Facility or Complex shall be required to provide a minimum of thirty (30) days written notice to the Town Clerk prior to abandoning any Facility or Complex.

D. Under the following circumstances, the Town may determine that the health, safety, and welfare interests of the Town warrant and require the removal of Facilities.

1. a Facility or Complex that has been abandoned (i.e. not used as Wireless Telecommunications Facilities) for a period exceeding ninety (90) consecutive days or a cumulative total of one hundred-eighty (180) non-consecutive days in any three hundred-sixty-five (365) day period, except for periods caused by force majeure or Acts of God, in which case, repair or removal shall be completed within 90 days of abandonment;

2. A Support Structure, Facility or Complex falls into such a state of disrepair that it creates a health or safety hazard or is deemed an attractive nuisance or a visual blight;

3. A Support Structure or Facility or Complex has been located, constructed, or modified without first obtaining, or in a manner not authorized by, the required Special Use Permit, or Administrative Approval, and the Special Permit or Administrative Approval may be revoked.

E. If the Town makes a determination as noted in §D(2) or D (3) of this section, then the Town shall notify the holder of the Permit or Administrative Approval for the Facility or Complex that said Facility or Complex is to be removed.

F. The holder of the Special Use Permit or Administrative Approval, or its successors or assigns, shall dismantle and remove the Facility or Complex and all associated structures and equipment from the site and restore the site to as close to its original condition as is reasonably possible, such restoration being limited only by physical or Commercial Impracticability. Restoration shall be completed within ninety (90) days of the receipt of a written notice from the Town. However, if the owner of the property upon which the Facility or Complex is located wishes to retain any access roadway to the Facility or Complex, the owner may do so with the approval of the Town.

G. If a Facility or Complex has not been removed, or substantial progress has not been made to remove the Facility or Complex, within ninety (90) days after the permit holder has received notice, then the Town may order officials or representatives of the Town to remove or have removed the Facility or Complex at the sole expense of the owner or Special Use Permit holder.

H. If the Town removes, or causes a Facility to be removed, and the owner of the Facility or Complex does not claim and remove it from the site to a lawful location within ten (10) days, the Town may take steps to declare the Facility or Complex abandoned, and sell all remaining equipment and materials.

I. Notwithstanding anything in this Section to the contrary, the Town may approve a temporary use permit/agreement for the Facility or Complex, but for no more than ninety (90) days duration, during which time a suitable plan for removal, conversion, or re-location of the affected Facility or Complex shall be developed by the holder of the Special Use Permit, subject to the approval of the Town, and an agreement to such plan shall be executed by the holder of the Special Use Permit or Administrative Approval and the Town. If such a plan is not developed, approved and executed within the ninety (90) day time period, then the Town may take possession and dispose of the affected Facility or Complex in the manner provided in this Section and may utilize the bond in Section 23 of this Ordinance.

Section 30. RF Emissions

A. As may be deemed appropriate from time to time, to assure the protection of the public health and safety, the Town expressly reserves the right under its Police Powers to require that a user of a Facility or Complex or the owner of the Facility or Complex, verify compliance with the FCC's regulations regarding cumulative RF emissions at the Site under the observation of a qualified staff member or the Town's consultant, and that all users of the Facility or Complex cooperate with the party responsible for such testing or verification. Failure to cooperate shall be deemed a violation of this Section and subject the non-cooperating party to all applicable and permissible fines and penalties.

B. In the event the Town deems it necessary to determine compliance with the FCC's Maximum Permitted Exposure (MPE) rules, and in lieu of the procedure contained in the preceding § (A) of this Section, the Town expressly reserves the right to request the involvement of the FCC and/or OSHA (Occupational Safety and Health Administration) to determine or verify compliance with federal standards and guidelines that the Town, itself, may be prohibited from determining.

C. With respect to Support Structures other than Towers, if any section or portion of the structure attached to or to be attached to is not in compliance with the FCC's regulations

regarding RF radiation, that section or portion must be barricaded with a suitable barrier to discourage approaching into the area in excess of the FCC's regulations, and be marked off with brightly colored plastic chain or striped warning tape, as appropriate, as well as placing RF Radiation signs as needed and appropriate to warn individuals of the potential danger. As deemed warranted by the Town at any time, the right of the Town is expressly reserved to do itself, or order done, an on-site RF emissions survey.

Section 31. Relief

A. Any Applicant desiring relief, waiver or exemption from any aspect or requirement of this Ordinance shall address and identify such at the Pre-Application meeting. The relief or exemption must be contained in the submitted Application for either a Special Use Permit or Administrative Approval, or in the case of an existing or previously granted Special Use Permit or Administrative Approval, a request for Modification of the Facility or Complex and/or equipment. Such relief may be temporary or permanent, partial or complete.

B. The burden of proving the need for the requested relief, waiver or exemption shall be solely on the Applicant to prove.

C. The Applicant shall bear all costs of the Town in considering the request and the relief, waiver or exemption.

D. No relief or exemption shall be approved unless the Applicant demonstrates by clear and convincing evidence that, if granted, the relief, waiver or exemption will have no significant effect on the health, safety and welfare of the Town, its residents and other service providers.

Section 32. Adherence to State and/or Federal Rules and Regulations

A. To the extent that the holder of a Special Use Permit or Administrative Approval for a Wireless Telecommunications Facility or Complex has not received relief, or is otherwise exempt, from appropriate State and/or Federal agency rules or regulations, then the holder of such a Special Use Permit shall adhere to, and comply with, all applicable rules, regulations, standards, and provisions of any State or Federal agency, including, but not limited to, the FAA and the FCC. Specifically included in this requirement are any rules and regulations regarding height, lighting, security, electrical and RF emission standards.

B. To the extent that applicable rules, regulations, standards, and provisions of any State or Federal agency, including but not limited to, the FAA and the FCC, and specifically including any rules and regulations regarding height, lighting, and security are changed and/or are modified during the duration of a Special Use Permit or Administrative Approval for Wireless Telecommunications Facilities, then the holder of such a Special Use Permit or Administrative Approval shall conform the permitted Facility or Complex to the applicable changed and/or modified rule, regulation, standard, or provision within a maximum of twenty-four (24) months of the effective date of the applicable changed and/or modified rule, regulation, standard, or provision, or sooner as may be required by the issuing entity.

Section 33. Conflict with Other Laws

Where this Ordinance differs or conflicts with other Local Laws, rules and regulations, unless the right to do so is preempted or prohibited by the Town, State or federal government, the more stringent shall apply.

Section 34. Authority

This Ordinance is enacted pursuant to applicable authority granted by the State and federal government.

ORDINANCE NO. 17-10-02

AN ORDINANCE TO AMEND TITLE 12 "STREETS, SIDEWALKS AND PUBLIC PLACES" OF THE MIDDLETOWN MUNICIPAL CODE BY ENACTING PROVISIONS PERTAINING TO THE REGULATION WORK WITHIN PUBLIC RIGHTS OF WAY TO BE DESIGNATED AS CHAPTER 12.12 "WORK WITHIN PUBLIC RIGHTS-OF-WAY".

SECTION I. BE IT ORDAINED AND ENACTED by the Burgess and Commissioners of Middletown that Title 12, of the Middletown Municipal Code be, and hereby is, amended by adding thereto the attached Ordinance entitled "An Ordinance Regulating The Authorization For Work Within Public Rights-Of-Way; Franchises, Licenses, And Permits" which is incorporated by reference herein, said Ordinance to be codified in the Code as Title 12, Chapter 12.12 "Work Within Public Rights-Of-Way". .

SECTION II. BE IT FURTHER ENACTED AND ORDAINED that this Ordinance shall take effect twenty (20) calendar days following its approval by the Burgess and Commissioners.

INTRODUCED ON THE 23RD DAY OF OCTOBER, 2017

PASSED ON THE 8th DAY OF January 2018

EFFECTIVE DATE: January 28, 2018

ATTEST:

Andrew J. Bowen, Town Administrator

BURGESS AND COMMISSIONERS OF MIDDLETOWN

By: _____
John D. Miller, Burgess

AN ORDINANCE REGULATING THE AUTHORIZATION FOR WORK WITHIN PUBLIC RIGHTS-OF-WAY; FRANCHISES, LICENSES, AND PERMITS

Purpose and Intent:

The Town of Middletown (Town) finds that i) extremely limited space exists in the public Rights-of-Way (PROW) that requires diligent responsible management, including but not limited to responsible and prudent siting policies; ii) protecting the public safety in and near the PROW is of paramount concern; iii) the Facilities that use and occupy the PROW often pose significant concerns regarding the health, safety, public welfare, protecting the nature and character of the Town and its neighborhoods and for the environmental effects of work and Facilities in the PROW. The Town recognizes that facilitating the development of the responsible policies regarding the use of the PROW can be an economic development asset to the Town and of significant benefit to the Town and its residents. To assure that the placement, construction and Modification of Facilities in the PROW are consistent and to the extent practicable for functionally similar Users are not discriminatory, and that the regulations governing the use of the PROW are reasonable and balanced, the Town adopts a single, comprehensive set of regulations governing the use and occupancy of the PROW. The intent of this Ordinance is to i) maximize the efficient use of the limited space of the PROW, minimize the physical impact of Facilities on the PROW and adjacent properties; ii) minimize the impact of Facilities on the community, including but not limited to the visual impact; iii) protect the nature and character of the community to the extent reasonably possible; iv) establish a fair and efficient process for the review of and action on applications; v) facilitate the processing of applications to the extent practicable; vi) assure taxpayers' money in the form of Town funds is not used to subsidize application-related costs normally and traditionally borne by an Applicant; vii) assure a prompt and efficient review of applications; viii) determine any negative environmental impacts associated with the location, construction and Modification of Facilities located in the PROW; and protect the health, safety and welfare of the Town, its residents and visitors.

Sec. 1. - Definitions.

The following words and terms in this division shall have the meaning given below unless the context indicates otherwise. These meanings shall apply whether a word is capitalized or not, or is singular or plural.

Application means a formal request for the authority, right or permission to place or Modify a structure in, and to use and occupy, the public rights-of-way prior to receiving the necessary permit(s), including but not limited to a building permit.

Attached Equipment means any equipment attached to a utility pole or other support structure in the PROW.

Authorization means written permission from the Town to apply for any required permits needed to construct, place, Modify or temporarily disrupt or do work in the PROW, including but not limited to

required permits such as building, electrical, street or curb cutting and excavation permits, or to maintain Facilities in the PROW, and includes but is not limited to a Franchise or a Town-granted License. An Authorization is not a permit, but must be issued or granted before applying for any Town permit.

Best Case means using that which is the most favorable to serve the intended purpose that is reasonably possible.

Certificate of Completion or *COC* means a document required and issued by the Town that confirms that all work represented in the application i) was properly permitted, including but not limited to having obtained all required permits such as building, electrical, street or curb cutting and excavation permits ; ii) was done in compliance with and fulfilled all conditions of all permits, including any final completion deadline; iii) was fully constructed as approved and permitted; and iv) a final inspection was requested, conducted and the work and the Facility passed the final inspection.

"Commercial Impracticability" or "Commercially Impracticable" means the inability to perform an act on conditions or terms that cumulatively are i) reasonable in commerce; ii) the cause or occurrence of which could not have been reasonably anticipated or foreseen; and that iii) jeopardizes the financial efficacy of the operation. Standing alone for a single facility or application, the inability to achieve a desired financial return on investment or profit shall not deem a situation to be "Commercially Impracticable" and shall not by itself render a requirement "Commercially Impracticable".

Complete Application means a document or series of documents containing all required information and that the information contained therein has been verified as being true, accurate and correct, and that all applicable fees and charges related to an Application have been paid.

Emergency means a condition that poses a clear and imminent danger to life, health, property damage or a significant loss of property, or requires immediate repair to restore an essential service to a group of Users of such service.

Excavate means, without limitation, any cutting, digging, grading, tunneling, boring, or other alteration of the surface or subsurface material or earth in the PROW.

Facility means any pole, pipe, culvert, conduit, duct, cable, wire, fiber, amplifier, pedestal, antenna, transmission or receiving equipment, other electronic equipment, electrical conductor, manhole, appliance, sign, pavement structures, irrigation system, monument sign, monument mailbox and any other similar equipment, for public or private use.

Franchise, License or *PROW Use and Occupancy Agreement means* a written contractual agreement setting forth both the required terms and conditions for the use and occupancy of the PROW, and any negotiated terms and conditions for such.

Ground-mounted Equipment means any equipment associated with the equipment attached to a utility pole or other support structure in the PROW that is located above ground.

Holder means the person or entity issued an Authorization, Franchise, License or Permit or the Transferee or assignee of such.

Maintenance means excavation, plumbing, electrical, carpentry or mechanical work that may or may not require a building permit, but that does not constitute a Modification to the WTF.

Modify or *Modification means* the addition, removal or change of any of the physical and visually discernable components or aspects of a Facility, including but not limited to the change to, or addition of, anything that changes the structural loading of the support structure, including but not limited to antennas, cabling, equipment shelters, landscaping, fencing, utility feeds, the color or materials of any visually discernable components, emergency and vehicular access, parking and/or an upgrade or change in equipment. Adding a User to an existing utility pole or support structure is a Modification of the utility pole or structure, unless the height, profile, diameter or size of the Facility is increased, in which case it is not a Modification, but shall be treated as a new structure.

Monument means any permanent, non-commercial structure placed in the public rights-of-way, such as, but not limited to, a mailbox or sign.

Necessary or *Necessity* or *Need* means what is technologically required for the equipment or service to function as designed by the manufacturer and that anything less will result in the effect of preventing or prohibiting the provision of service as intended and described in the Application. Necessary, Necessity or Need does not mean what may be desired, preferred or the most cost-efficient approach, and is not related to an Applicant's specific chosen design standards.

Person means an individual, association, firm, partnership, limited liability company, joint venture, corporation, government, utility, or other organized entity able to contract for the activities described in this Ordinance, whether for profit or not for profit. The term does not include the Town.

Public Right of Way or PROW means the area that is used as, or offered, dedicated or reserved for use as a public street, highway, alley, trail, sidewalk, curb, gutter, bike lane, bridge, round-about, tunnel, causeway, or shoulder that is located in the Town or in an area proposed for annexation to the Town. The area also includes, without limitation, drainage areas and dedicated areas, whether with or without surface improvements and that are adjacent to improved areas dedicated for one or more of the above listed uses. The PROW encompasses the surface of the ground, and the area above and below the ground.

Rubber Stamp or Rubber Stamping means to review without meaningful, thorough review of an application as represented by the requirements of this Ordinance. Rubber stamping of an Application shall not be permitted.

*Telecommunication(s)*means the provision or exchange of information by electronic, electrical and radio frequency means involving a transmission source and/or a receiving source and includes a single co-arrangement of transmitters and receivers, known as a transceiver.

Telecommunications devices means and includes any User owned or controlled communications equipment, including a telephone, computer, television or any functionally equivalent similar device.

Telecommunications equipment means and includes wireless radio frequency transmission or receive equipment, microwave equipment, fiber optic cable, coaxial cable, satellite transmission or received equipment larger than eighteen inches (18") in diameter and any Internet access modem.

Town means the Burgess and Commissioners of Middletown, Maryland.

User or Person means an individual or entity that uses the PROW to conduct business, excluding the vehicular or pedestrian use of the PROW, and does or proposes to place Facilities in the PROW, places such Facilities, or owns or maintains such Facilities. The term includes, but is not limited to Licensees and Franchisees.

Warehouse or Warehousing means obtaining the required Authorization to work, construct, Modify or replace a structure or equipment in the PROW and not expeditiously performing the authorized work in a reasonable time frame as set forth in Section 9 of this Ordinance.

Sec. 2. - General conditions for use of the PROW.

The provisions of this Ordinance apply to work performed in the PROW and to Facilities that have been or are proposed to be placed in the PROW, except for maintenance and/or repair work. Non-compliance with a requirement in this Ordinance is a violation of the law and is subject to all remedies available under the law. The right to perform work in the PROW and the ability to maintain Facilities in the PROW are allowed subject to the conditions that follow, and as supplemented by those set forth in other sections of this Ordinance, standards adopted by the Town, and requirements contained in Authorizations.

A. An Authorization does not grant an exclusive right to provide a service or to construct, operate, Modify or maintain a Facility in the PROW.

B. The Town retains all rights it may have to use all portions of the PROW for any purpose not prohibited by law.

C. A permit or Authorization does not convey any title to any portion of the PROW.

D. The Town and its officials, officers, and employees shall not be liable for any direct, indirect, or consequential damages that result when Facilities in the PROW are damaged during the construction, installation, Modification, inspection, maintenance, or repair of public improvements that have received funding from a governmental entity or that are installed pursuant to a contract with the Town.

E. Users and persons who cause work to be done in the PROW shall pay for all damage that results, directly or indirectly, from work performed for their benefit in the PROW, and for the installation, repair, maintenance, and operation of their Facilities in the PROW.

F. Non-enforcement or lack of prompt enforcement of one or more provisions of an Authorization does not waive the Town's right to enforce the provisions of an Authorization.

G. An Authorization creates no third-party rights against the Town and is intended only for the benefit of the person(s) receiving the Authorization.

H. An Authorization does not limit the Town's exercise of its regulatory, police, governmental, legislative, or contracting authority. If an Authorization conflicts with the terms of a permit or with the Town code, the more strict shall control.

I. The owner of a pole or other structure shall be responsible for the Facility as a whole at all times being in compliance with all permitting and safety regulations, including any

attachments to the pole(s) or other structure(s). At no time shall an owner allow unpermitted work on or at a Facility.

J. The Town shall review applications to determine whether a use would have a detrimental effect on public safety as it relates to the PROW or would place an undue physical burden on the PROW.

K. In considering an application, the Town may use such outside experts as it deems necessary. In the event the Town deems it necessary to employ an outside expert with respect to a particular application. The reasonable and verifiable cost of such expert shall be borne by the applicant.

L. By the acceptance of a PROW permit, the applicant agrees to assume all liability for all or any damages to persons or property accruing to the public or to the Town which may or might result from the opening or excavation.

M. The issuance of a PROW Authorization for any purpose, including but not limited to construction or replacement of support poles, shall constitute an agreement on the part of the Applicant that it will at any time thereafter, upon notice from the Town, at its own expense, make such change in location or construction of such facility as may be necessary to protect the public safety property values.

Sec. 3. – Right-of-Way Management.

A. The Town shall have the right to limit activity and the placement of new or additional equipment, materials, or facilities in a PROW if there is insufficient space to reasonably accommodate all requests to occupy and use the PROW.

B. The Town shall consider requests for occupying and using a PROW in the order of receipt of fully completed applications for PROW permits.

C. The Town shall strive, to the extent reasonably possible, to accommodate all requests, but shall be guided by the physical space available in, and the condition of, the PROW at the requested location, and whether such use would have a detrimental effect on public health, safety or welfare as it relates to the PROW.

D. The Town shall have the right, to monitor any equipment or activity located in a PROW.

E. A permit holder shall allow the Town to make inspections of any part of the permit holder's equipment, material, or facilities located in a PROW at any time upon three (3) days' notice or, in the case of an emergency, upon direction or demand by the Town.

F. The Town shall have the right to prohibit a permit holder from attaching any telecommunications antenna or other such equipment to any Town historic-style streetlighting.

Sec. 4. - General requirements for work in the PROW.

A. *Authorization; required information.* Persons doing work in the PROW and Users of the PROW, including but not limited to Users with a Franchise or License with the Town, shall obtain an Authorization and all required permits and shall pay applicable application, review, permit,

expert assistance and inspection fees. The Town shall not issue an Authorization or Permit(s) if the person or User owes money to the Town for prior fees, restoration costs, or other costs sustained by the Town in connection with an Application for Authorization, work done or Facilities in the PROW, and is more than sixty (60) days in arrears.

B. *Information required.* Applicants for Authorization shall furnish accurate drawings, maps, and any other relevant information that may be required by the Town Administrator for the particular type of work involved, in the form the requests and shall seek approval of construction and Modification plans, if required.

C. *Compliance with requirements; revocation of Authorizations.* Persons and Users shall comply with this Ordinance, with any additional standards adopted by the Town, and with the requirements of Authorizations and permits granted pursuant to Authorizations. As may be permitted by applicable State law, the Town Administrator may revoke an Authorization for noncompliance with any term, condition or implemented standards and requirements, or when, after notice to the holder of the Authorization, an activity continues to hamper or obstruct the use of the PROW or endangers the public health or safety.

D. *Bonds; performance guarantees.* For any new pole or structure located in the PROW, a person or a User conducting activities subject to this Ordinance in the PROW may be required to provide a performance bond or other performance guarantee for the work. The amount, form, and content of the guarantee shall be determined in the discretion of the Town based on the facts and circumstances involved.

(1) Users with multiple Facilities in the PROW shall be allowed to provide a single bond or performance guarantee that covers all of its Facilities in the PROW in the Town.

(2) The Town may increase or decrease the amount of the bond or performance guarantee required.

(3) The Town shall determine, in its discretion, the time period for which a performance guarantee shall be kept in force.

(4) The Town may consider, among other things, the time period for a project and assessment of the performance of the project, the length of a License or Franchise, and/or the projected time during which Facilities will exist in the PROW.

(5) The performance guarantee shall, among other things, ensure compensation for i) damages resulting from the proposed work or a User's maintenance of Facilities in the PROW; ii) direct and indirect costs to the Town of remedying damage to the PROW or Facilities within the PROW; iii) direct and indirect costs to the Town of remedying matters of noncompliance with Town Ordinances or Authorizations; and iv) fines or penalties or fees owed to the Town.

(6) The rights reserved to the Town under a bond or performance guarantee do not limit the claims or rights the Town may bring against a person, except where a bond or guarantee has fully satisfied a Town claim.

(7) Every bond or performance guarantee shall require the surety to provide notice of cancellation or nonrenewal by registered or certified mail, which notice must be received by the Town Administrator at least 30 days prior to any cancellation or nonrenewal.

E. *Insurance.* The Town may require Users and persons that do work in the PROW to provide insurance in an amount deemed adequate by the Town Administrator, the Town Attorney and/or the Town Risk Manager. The insurance shall be issued by a company authorized to do business in the State, including but not limited to: i) workers' compensation coverage as required by State law; ii) employers' liability insurance; iii) commercial general liability; and iv) business auto policy. The Town's officials, employees and consultants shall expressly be named as additional insureds on such insurance policies. The amount of insurance shall be as determined by the Town, in part based on the scope of the work and the tenure or term of occupancy.

F. *No interference with Town utilities.* Persons doing work in the PROW shall not interfere with existing utilities, including such infrastructure as water, sewer, gas and electric, the natural and constructed storm water system, traffic signals and associated lines, or with the repair or replacement of such systems. Persons doing work in the PROW shall give the Town Administrator at least ten working days advance notice to locate and mark any existing Town utility lines prior to initiating work. Damage to utilities or other infrastructure shall be paid for by the person or User contracting for the work that resulted in such damage.

G. *Compliance with regulations, safety standards, and applicable codes and standards.* Compliance with all applicable federal, state and local regulations, and all applicable federal, state, local and industry codes and standards is required. These include, but are not limited to, compliance with the Occupational Safety and Health Act and applicable rules and regulations subsequently enacted, compliance with the latest versions of the National Electrical Code, National Electrical Safety Code, TIA-ANSI 222, compliance with fiber optic installation standards and telecommunication industry standards, compliance with plumbing and pipe installation codes and standards, and compliance with standards and codes for traffic safety and lane closures. Persons and Users shall provide all equipment and personnel necessary to meet applicable regulations, codes, and standards and shall furnish additional equipment or personnel if directed by the Town. Information requested by the Town regarding compliance with these standards shall be provided within the time frame requested by the Town.

H. *Licensed professionals.* Where required under state law, work in the PROW shall be performed and supervised only by qualified persons and licensed professionals as deemed appropriate by the Town Administrator.

I. *Notice of beginning and end of project.* Persons doing work in the PROW shall promptly notify the Town Administrator upon beginning and ending the work authorized in a given Application, and shall promptly request a final inspection of the work and the condition of the PROW at the location(s) where the work was performed. A copy of a passing final inspection report for the latest work performed at a given location(s) shall be required as part of any future application or Authorization by that person for work at that location(s).

J. *Inspections; fees.* The Town Administrator shall conduct, or have conducted, inspections of work performed in the PROW. Users and Persons performing such work shall comply with all Town directives to facilitate such inspections. The Town Administrator may charge fees as set by the Town for such inspections, which may be varied to account for the nature and scope of the project, the number of inspections required, or other relevant factors. The Town Administrator may direct a person or User to do additional work if warranted by the result of an inspection and such person or User shall promptly comply with such directive.

K. *Removal for Violation.* Unless prohibited by State law, if Facilities are installed in violation of this Ordinance, the Town may require their removal, at the owner's sole expense.

L. *Identification.* All utility poles and any other support structure or ground-mounted equipment erected within the boundaries of any public highway, street or other right-of-way shall be lettered or stenciled in a permanent manner with the initials of the owners or with some other designation of ownership, together with a number for the same. A report or map showing the location and number of each pole shall be filed by the owner or owners of said poles with the Town annually on or before July 1st of each year.

M. The filing of an application and the issuance of a permit for the erection of a utility or similar pole shall constitute an agreement on the part of the applicant that it will at any time thereafter, upon notice from the Town, at its own expense, make such change in location, external support and restore the pole to plumb as may be required.

Sec. 5. – Indemnification, Hold Harmless and Insurance.

A. *Indemnification and Hold Harmless.* A permit holder shall, at its sole cost and expense, after the effective date of this Ordinance indemnify and hold harmless the Town and its elected and appointed officials, employees and agents at all times against any and all claims for personal injury, including death, and property damage arising out of the permit holder's use or occupancy of a right-of-way.

B. A permit holder shall defend any actions or proceedings against the Town in which it is claimed that personal injury, including death, or property damage was caused by the permit holder's use or occupancy of a right-of-way.

C. The obligation to indemnify, hold harmless and defend shall include, but not be limited to, the obligation to pay judgments, injuries, liabilities, damages, attorneys' fees, reasonable expert fees, court costs and all other costs of indemnification.

D. A permit holder shall not be required to indemnify and hold the Town harmless for claims caused by the Town's or any person's negligence, gross negligence or willful misconduct.

E. A permit holder shall, at all times during the life of a PROW Authorization carry, and require its subcontractors to carry, liability, property damage, workers' disability, and vehicle insurance in such form and amount as shall be determined by the Town and as set forth in the Authorization. A permit holder shall name the Town as an additional insured on its liability insurance policies.

F. All required insurance coverage shall provide for 30 days' notice to the Town in the event of material alteration or cancellation of such coverage prior to the effective date of such material alteration or cancellation.

Sec. 6. - Work in PROW requiring an application; Authorizations; standards; fees.

A. Grandfathered Facilities: All existing Facilities in the PROW as of the date of adoption of this Ordinance shall be grandfathered and not subject to this Ordinance, until such time as an Authorization as required under this Ordinance is needed.

B. *Work requiring an application to the Town.* Persons and Users of the PROW shall make application to the Town Administrator for the following activities in the PROW, and obtain the necessary Authorizations and permits before initiating the work:

(1) The Construction of one (1) or more new poles or other structures, or the replacement of such.

(2) The Installation of Facilities for electrical, gas, video, internet, telephone, cable, hardline or wireless Telecommunications, television, or other information or data transfer service to customers within the Town.

(3) The Excavation or disturbance of the surface within the PROW, including but not limited to construction of new portions of the PROW;

(4) The cutting, moving, alteration or modification of any pipe, conduit, pole or other support structure, meter, hydrant, Telecommunications Facility, or other equipment or structure, or attachment to such structures or Facilities;

(5) The Modification of Facilities within the PROW, including but not limited to equipment enclosures associated with equipment on a utility pole or other support structure, and placing new Facilities or equipment on structures already located in the PROW; and

(6) The Installation or modification of Facilities used for the conveyance of utility or utility-like services, including but not limited to water, sewer, storm water, electricity, hardline or wireless Telecommunications irrespective of the medium or technology used that involves any safety, aesthetic or visual intrusion or impact issues;

C. *Authorizations - Franchises, Licenses, permits, construction drawings, and other approvals.* Depending upon the work involved, including but not limited to the degree or extent of the physical or visual impact involved, the Town Administrator may in its discretion require Authorizations, as well as one or more types of permits such as a building, electrical, excavation and street and/or curb cutting permit for the work described in §(B) of this Section, and may require submission of all information it deems relevant and necessary for the receipt of an Authorization(s). The Town Administrator shall determine, in its discretion, whether Authorization shall be required for work described in §(B) and for Users with Facilities in the PROW.

D. *Unlawful to do work without Authorizations; Emergency.* Except in the event of an emergency, it shall be unlawful to do work in the PROW or maintain Facilities in the PROW without the required Authorizations. In the event of an emergency, a person may do such work as is necessary to address, and if necessary and remedy the emergency situation, but only the emergency situation, and shall immediately notify the Town of such. Application shall immediately be made for necessary Authorizations from the Town, notwithstanding that due to the emergency nature of the work, work may have started or been completed, and all required fees shall be paid even if after the fact.

E. *Standards.* The Town Administrator shall develop standards and requirements for PROW Franchises, Licenses, permits, and other approvals, and may attach conditions to such documents. The Town Administrator may also develop specific standards and requirements for doing work in the PROW, even if a Franchise or License may not be required.

F. *List of contractors.* The Town Administrator may require that Applicants and persons who contract to have work performed in the PROW maintain an updated list of the contractors working on their projects, and acknowledge and assume responsibility for the actions of the contractors. All contractors working in the PROW must obtain a Business License from the Town.

G. *Fees; accounts.* The Town Administrator shall charge such fees as are authorized by the Town for applications for Authorizations, review of information and plans in the pursuit of an Authorization, inspections and reinspections, maintenance of Facilities in the PROW, verification of accuracy and correctness of information, oversight or administration of proposed ongoing or completed activities, and for any other work involved in the review of an application or request for Authorization. The Town Administrator may allow persons to establish and fund escrow accounts or other accounts with the Town to which fees may be charged and from which payment may be withdrawn, as long as the amount of any withdrawal is replaced within thirty (3) calendar days of the date of withdrawal.

H. *Reinspection fees.* The Town shall charge fees as are authorized by the Town for additional reviews and inspections required for work not completed to Town standards and/or work that damages existing infrastructure, as well as restoration of disturbed or damaged portions of the PROW.

I. *Civil penalties.* Any person who violates this Ordinance may be subject to all civil and equitable remedies as allowed by law. Notwithstanding the foregoing, the violation of a stop work order issued pursuant to this subsection shall constitute a misdemeanor and may be punishable as such. The Town shall charge civil penalties as are authorized by the Town for:

(1) Violation of subsections (a) and/or (b).

(2) Additional violations of subsection (a) and/or (b) by the same User within one-year of the first violation.

J. *Assessment of Civil Penalties.* Civil penalties authorized by this section may be assessed against the User on whose behalf work is being performed and against the contractor or subcontractor who is performing such work. Penalties not paid within 30 days of written demand will be assessed a late fee of one percent of the unpaid balance per month.

K. *Stop work order.* When there is a violation of this Ordinance the Town may issue a stop work order to any person or entity performing work in the PROW. A stop work order shall be in writing, state the date, the location, the work to be stopped and the reasons therefore, and state the conditions under which the work may be resumed.

L. *Barricading work:* All activity in a public PROW must be properly marked and barricaded and, if deemed necessary by the Town Administrator, by flashing amber lights so placed as to indicate from the roadway or pedestrian way in both directions the exact location and limits of said occupation or activity and at all times must be properly guarded. Permit holders are responsible for maintaining safe conditions in and around the area of occupation in a public PROW and in areas of related activity at all times during the activity or work. The permit holder shall comply

with all applicable safety ordinances, rules, regulations, codes and policies at all times and under all circumstances.

Sec. 7. - Restoration of surrounding areas.

A. *Obligation to restore disturbed areas.* A person or User that conducts excavation or other activities that disturb the PROW or Facilities within the PROW, shall restore the PROW to a condition equivalent to that prior to the disturbance. The restoration shall include, but is not limited to, installation of pavement, resurfacing nearby or adjacent areas, grading any disturbed unpaved surface areas, restoring below ground Facilities, planting and landscaping, replacing curb and curb ramps to applicable standards, and repairing improvements and Facilities. Restoration shall meet the standards set by the Town Administrator. Such restoration includes any work necessary to maintain the nature and character of the area that existed prior to the work.

B. *Temporary restoration.* Where permanent restoration is impractical because of weather or other circumstances, the Town Administrator may require temporary restoration to be followed by permanent restoration.

C. *Timetable for Restoration.* The Town Administrator shall determine the time period during which restoration must be accomplished on an individual case-by-case basis and such time period shall take into account the extent of the restoration work required, availability of needed materials and other limiting factors.

D. *Repair of inadequate restoration work.* The Town Administrator's inspection and/or approval of original restoration work does not waive the Town Administrator's or the Town's right to require additional restoration where and when warranted. Therefore, where restoration work proves to be inadequate over time, as determined in the Town Administrator's discretion, if the issue is not one of normal wear and tear or is not caused by a third party, but is truly due to the inadequacy of the restoration, the Town Administrator may require additional reasonable restoration. Such additional restoration may be required for a period of three years from the date of completion of the initial restoration work. The person responsible for the work necessitating the original restoration shall be responsible for the costs of the additional restoration and inspection.

E. *Reimbursement to Town of costs of restoration.* If a person responsible for damage to the PROW does not complete required restoration during the period required by the Town Administrator, the Town may complete the restoration. The costs for such shall be promptly reimbursed by the User or the person responsible for the original work that required restoration of the PROW.

Sec. 8. - Requirements for location, construction relocation, modification, maintenance and removal of Facilities in the PROW.

Users that locate, relocate, modify, repair, maintain, or remove Facilities in the PROW shall comply with the following requirements.

A. *Locations.* The Town Administrator shall have the discretion to determine compliance with this Section and to approve, deny, alter and condition all proposed locations of Facilities in the PROW, and to determine whether placement, if allowed, shall be above ground or below ground, all as determined by the technical need of the Applicant for a specific location, or alternatively the technological impracticability of a given location.

B. *Maximum Permitted Height*: Absent a showing by clear and convincing technical or safety-related evidence of the need for a greater specific height for reasons of technical Necessity, technical impracticability or compliance with applicable safety codes, the maximum permitted height for new or replacement poles or other support structures in the PROW, including any increases in height of existing structures and poles, shall be thirty-feet (35') above pre-construction ground level. Thirty-five feet is not as-of-right, but is the maximum permitted height, and shorter, minimally impactful and intrusive poles and support structures shall be preferred.

C. *Minimum Distance Between Poles or other support structures*: Absent a showing by clear and convincing technical evidence of the technical Need for a greater distance between poles or other support structures in the PROW or for safety-related reason, the minimum distance between poles or other support structures on the same side of a street as measured in any direction shall be one hundred feet (100'). This minimum distance shall not be applicable for poles or support structures that are used to support lines or cables crossing a street or other man-made or natural barrier.

D. *Least Visual Impact.* Any equipment attached to a utility pole or other support structure shall be of a size and be located and constructed so as to create the least visual impact on the immediate surrounding area reasonably possible, and the least physical intrusion and impact on the limited space in the PROW, including occupying both the least amount of vertical and horizontal space reasonably possible. Absent the demonstration by verifiable clear and convincing technical evidence of the inability to use smaller equipment, no equipment shall be allowed in the PROW to be attached to or associated with a utility pole or other support structure of a size large enough to require an Environmental Assessment Analysis and Report under federal or State law or rule.

(1) Equipment Inside Pole. Excluding electric utility lines and equipment, after the effective date of this Ordinance cables used to distribute wireline communications service(s) under Title II or Title IV of 47 U.S.C, shall be placed inside the pole or support structure, unless technologically impracticable, or unless doing so would prevent compliance with applicable safety codes or such equipment is able to be attached mid-span to the transmission cable.

(2) Pole Replacement. If placement inside a pole is physically or technologically impracticable, then, as determined most appropriate under the facts and circumstances by the Town Administrator, the pole shall i) be replaced in compliance with Section 12 of this Ordinance, or ii) if deemed appropriate under the facts and circumstances the equipment shall be stealthed or camouflaged to the reasonable satisfaction of the Town Administrator. If a pole is to be attached to, replacement of poles in compliance with Section 12 of this Ordinance shall be preferred to stealthing or camouflaging.

(3) If new equipment to be attached to an existing pole necessitates increasing the height of the pole, the pole shall be replaced with an *approved* type of pole as set forth in Section 12 of this Ordinance.

(4) *Maximum Size of Pole-Mounted Equipment.* Excluding cable, the maximum size of any piece of hardline or wireless communications equipment attached to a pole or other support structure, such as but not limited to amplifiers and antennas or other transceivers, shall not exceed three (3) cubic feet in total volume and would fit within an imaginary enclosure or container three (3) cubic feet in volume. This standard shall apply in all instances, unless the Applicant can justify with verifiable written evidence that the three (3) cubic feet maximum allowed size would, in effect, prohibit the construction of the facility. Any greater size shall be the minimum amount able to be proven to be needed for reasons of Technical Need or safety.

(5) *New & Replacement Poles or Support Structures*: In addition to all other information required, an application for a new or replacement pole or support structure, must include detailed design characteristics, including overall dimensions, material composition, aesthetic appearance, a detailed site plan and a structural analysis with calculations which must be certified by a Professional Engineer licensed in the State and be able to be independently verified using the information submitted by the Applicant. Depending upon the situation and circumstances involved, to-scale photo simulations may be required showing the Facility as it will appear upon completion, showing the Facility from four (4) directions, each with ninety degrees (90°) azimuth separations.

(6) *Lateral Extensions*: No lateral equipment extensions parallel to the PROW from a pole or other support structure in the PROW, such as but not limited to equipment standoffs, shall exceed three (3) feet in length.

(7) *Riser Cable*: All exterior riser or other vertically run cable attached to the exterior of a pole or other support structure shall be protected with non-conductive, non-degradable material and shall be of a color that matches the color of the pole or other support structure as closely as is reasonably possible.

(8) *Ground-mounted Equipment and Equipment Enclosures*: Absent a showing by clear and convincing technical evidence of the technical Need or for safety reasons for a greater size, nothing larger in size than seventeen (17) cubic foot enclosure may be placed above-ground in the PROW.

(9) *Compliance with NESC and NEC*: All attachments to poles or other structures in the PROW, and all underground work and Facilities placed underground, shall at all times be in compliance with the edition of the National Electrical Safety Code (NESC), the National Electrical Code (NEC), the State Building Code and the Office of Safety Administration (OSHA) regulations in effect at the later of i) the time the Facility was constructed; ii) the time of the last modification of equipment on the pole or other support structure; or the edition in effect at the time of the current application.

(10) *Compliance with TIA-ANSI 222 re Stand-alone communications poles and structures*: All poles or support structures used only by providers of communications service(s) shall comply with the latest version of TIA-ANSI 222 at the time of construction, as well as at the time of any Modification. Verification of submitted evidence of compliance with the

applicable version of TIA-ANSI 222 shall be a prerequisite for the issuance of a building permit.

E. *Underground locations for wire and fiber.* Wires, fiber, and conduits shall generally be located underground, except in areas zoned for above-ground Facilities. A User that wishes to place such Facilities above ground in an underground area shall demonstrate to the Town's satisfaction why above ground placement is a Necessity.

F. *Existing ducts.* If underground ducts or conduits are available and not technologically impracticable to use, underground wires shall be located in such ducts or conduits. Before installing new ducts or conduits, a User shall make all reasonable effort to procure the right to use existing ducts or conduits upon reasonable terms and charges negotiated by and agreed to by the parties.

G. *Documentation of sufficient space.* A User shall provide verifiable evidence to demonstrate to the Town Administrator's satisfaction that sufficient space exists in the PROW and on any pole for proposed new or modified Facilities to be placed without interfering with existing or future public projects, and that the placement of the pole, other structure and/or equipment will not unduly or unnecessarily disrupt the normal use of the PROW, negatively impact the permanent condition of the PROW or by itself negatively impact adjacent property values.

H. *Public noticing.* Depending upon the facts and circumstances involved, for projects involving the disruption of vehicular or pedestrian traffic in the PROW, breaking the integrity of the surface of pavement or sidewalk, or when involving a new structure(s) or the increase in height of an existing structure by more than ten percent (10%) of its existing height, the Town Administrator shall i) require the Applicant to post notice of the proposed work and its scope on the Town's website or post a reasonably sized notice no smaller than twenty-four inches (24") by eighteen inches (18") on or within three feet (3') of all utility poles along the impacted portion of the PROW or ii) distribute written notices to all individual properties for a distance of two-hundred feet (200') from the location of any such work in or adjacent to the area of PROW, for a minimum of one (1) calendar week prior to the start of the work proposed.

I. *Documentation to Town upon completion.* Upon completion of the authorized work, the person responsible for the work shall give the Town Administrator and the Town all reasonable information either requests regarding the work performed. Such information may include, but is not limited to as-built or other appropriate drawings and maps, in the form required by the Town Administrator.

J. *Maps and information on file with Users.* During the time a person or User has Facilities in the PROW, the User shall maintain up-to-date as-built maps showing both the general and specific placement of its Facilities in the PROW. A User shall also maintain information regarding the function and capacity of its Facilities and, upon request by the Town, furnish said maps and information to the Town Administrator within the time period specified, at no cost to the Town and in such form and detail as the Town requires.

K. *Underground location.* Users with underground Facilities shall maintain a membership in the State's underground locating system and respond to and locate underground Facilities and equipment as required by applicable State regulations and requirements.

L. *Relocation of Facilities.* A User shall, at its own cost, relocate its Facilities within a reasonable time frame as determined by the Town Administrator, if the Town determines that the Facility(s):

(1) Interferes with a use of the PROW, or the provision of services to Town residents; or

(2) Interferes with the repair or maintenance of any Town-maintained utility; or

(3) Will impede the construction of a project funded in part with public funds, or a project to be dedicated to the public upon completion, or

(4) That the PROW can be better or more efficiently utilized by the relocation of the Facility(s).

M. *Maintenance of Facilities.* Users shall monitor, maintain, and repair their Facilities in the PROW to assure that they function in a safe manner and do not create a risk to persons or property. To allow adequate public notification, Users shall notify the Town Administrator at least forty-eight (48) hours in advance of maintenance and repair work that may disrupt or impede the use of the PROW or its use, including the nature and scope of the work and the estimated duration of the disruption or impedance.

N. *Removal of Facilities in the PROW.* Facilities placed in the PROW without Authorization and all required currently valid permits, and Facilities for which a License or Franchise has expired, shall be removed upon order of the Town. In addition, all abandoned Facilities, or Facilities that do not function as intended for ninety (90) consecutive calendar days, shall be removed by their owner. If Facilities that are required to be removed are not removed within fourteen (14) calendar days of notice by the Town, the Town may remove them or have them removed, with the cost of removal to be borne by the holder of the Authorization or owner of the Facility(s).

O. *Third party use.* Authorized and properly permitted Users shall allow other authorized Users of the PROW to utilize available space in or on the User's Facilities upon reasonable terms and charges or as otherwise proscribed by the State or federal government. For private investor-owned Facilities only, charges calculated in accordance with section 224 of the Communications Act of 1934, as amended, 47 USC 224 shall constitute reasonable charges for pole attachments.

P. *Certificate of Completion.* An Application for the Modification of a Facility, for attachments to a pole or other support structure, or to place a ground-mounted equipment enclosure(s), shall contain a copy of the COC issued for the last previous work at that location or on that Facility that required a final inspection and the issuance of a COC. Such an Application will not be deemed Complete without such previously issued COC.

Q. *Failure to apply for and be granted an Authorization and/or to obtain a Certificate of Completion.* Failure to apply for and be granted an Authorization and/or a COC, each as required under this Ordinance, shall result in the appropriate party being required, as appropriate, to i) apply for and be issued an Authorization and/or ii) obtain a COC prior to any further work being performed at the location or Facility.

R. *Rubber Stamping Prohibited.* As no two locations or Facilities are identical and many are not even substantially the same, it shall be impermissible for an Application for an Authorization issued under this ordinance to be Rubber Stamped by any Department of the Town, and each Facility and location, whether applied for individually, or as part of a consolidated application pursuant to subsection 9(i)(2) of this Ordinance, shall be individually reviewed and analyzed in a meaningful manner so as to identify any issues or matters of concern and for compliance with all applicable laws, rules, regulations, ordinances, codes and accepted practices.

Sec. 9. - Exemptions from requirements.

The Town Administrator or the Town may exempt the Town and its contractors and the Maryland Department of Transportation (MdDOT) from particular requirements in Sections 2 through 5 of this Ordinance when substantial compliance has been assured through the Town's contracting system or, in the case of MdDOT, where the need for state infrastructure on Town roads, or a joint undertaking by the Town and MdDOT, or the use of state controlled areas of the PROW makes the application of such requirements unreasonable.

Sec. 10. - Franchises and Licenses.

A. *Users or Occupants in the PROW subject to a Franchise.* In order to use, place or maintain Facilities in the PROW, all persons that operate utilities, quasi-utilities, Telecommunications Facilities or provide services using the PROW that the Town may legally Franchise or License, shall apply for a Franchise or License from the Town. Services for which a Franchise or License shall be required include, but are not necessarily limited to telephone, Telecommunications irrespective of the medium or technology used, electrical power, water distribution, wastewater collection, sewage collection, gas distribution or transportation, trash and solid waste collection and/or disposal, off-street parking Facilities, and storm water management and drainage Facilities.

B. *Performance guarantee.* All new Users after the effective date of this Ordinance shall provide the Town with a performance bond or other performance guarantee satisfactory to the Town Administrator, the Town attorney and/or the Town Risk Manager.

C. All Users, Licensees and Franchisees shall obtain all required permits prior to performing work in the PROW.

D. *Franchises or Licenses.* After the effective date of this Ordinance, if allowed or required by Town or State law or regulation, a proposed new User applying after the effective date of this Ordinance shall apply for and be issued a Franchise or License, as appropriate, prior to the placement of any equipment or structure in the PROW. The Director of Public Works or the Director's designee, shall determine, in his/her discretion, the necessity of a Franchise or License and the type of Franchise or License, taking into consideration the length of time the Facilities will or are expected to be in the PROW, the potential impact on the PROW, and the Town's prior practice. Facilities for which a Franchise or License shall be required include monument signs, monument mailboxes, coaxial and fiber optic cable, non-Franchised Telecommunications equipment irrespective of the medium or technology used, irrigation systems, specialty street signs, canopies, specialty pavement structures, and other semi-permanent or permanent structures or features in the PROW.

(1) *Monument signs and mailboxes.* A License shall be required for any monument sign or private mailbox.

(2) *Telecommunications Facilities and service providers.* After the effective date of this Ordinance, new Telecommunications Users must obtain a PROW use and occupancy agreement, Franchise or License before constructing or adding equipment that is subject to the Telecommunications Act of 1996 (47 U.S.C. as amended), as well as providers of retail or wholesale Telecommunications services using third party-owned Facilities located in the PROW. The Town shall be responsible for granting a Franchise or License

for Users proposing to construct and maintain Telecommunications Facilities within the PROW.

(3) *License or Franchise for other Facilities.* The Town Administrator may grant a License or Franchise to construct and maintain other Facilities not included in subsection (D)(1) and (2) of this subsection.

E. *Contents of Franchises and Licenses.* Licenses and Franchises shall, at a minimum, contain the following provisions:

(1) The identity and legal status of the User in the State;

(2) The name and contact information of the officer, agent, or employee of the User responsible for communications with the Town, which shall be updated as the information changes;

(3) A general description of existing and proposed Facilities and the specific locations and portions of the PROW to be utilized for such Facilities, with additional specifics as may be required by the Town Administrator;

(4) A description of the Facility(s) proposed to be located in the PROW, including manufacturer's cut sheets for any active electronic device(s) and a to-scale photo of the location prior to construction and a photo simulation of the location showing the Facility after construction from four (4) directions, each with ninety degrees (90°) azimuth separations;

5) A description of the services to be offered within the Town, if any, and identification on a street map of the Town of the specific parts of the Town or properties within the Town where such services will be available, which description and map shall be updated when the service area(s) change;

(6) A description of the services or Facilities to be offered to the Town itself, or to other public or governmental institutions within the Town, if any such services are to be offered;

(7) Acknowledgment that the License or Franchise does not limit the Town's police power and that the Town may enact additional Ordinances, standards, and requirements applicable to Users;

(8) Acknowledgment that the User may be required, at User's sole cost and expense, to obtain certain permits and approvals from the Town in addition to the License or Franchise;

(9) Acknowledgment that the User is responsible for all damage caused by its employees, agents and contractors;

(10) A commitment to pay for all damages that arise in connection with the User's acts or omissions in the PROW;

(11) A commitment to defend and indemnify the Town for all claims and liabilities that arise in connection with the User's acts or inappropriate or impermissible lack of action in the PROW;

(12) A description, including the amount, of bonds or performance guarantees and insurance that are required;

(13) The proposed length of term of the Franchise or License;

(14) An acknowledgment that transfer or assignment of an Authorization, License, or Franchise requires approval of the Town, such approval not to be unreasonably withheld;

(15) The amount of compensation paid to the Town for the use of the PROW and a schedule of payment of such;

(16) The total fully-allocated capital cost of the project.

F. *Assignment.* Unless an Authorization, Franchise or License prohibits assignment to a different party, notice of the assignment shall be given to the Town Administrator not fewer than 30 days prior to the effective date of the assignment, with ownership and contact information updated to reflect the assignee's ownership and contact information.

G. *Information available to the Town.* All Users, Licensees and Franchisees shall provide the Town within ten (10) calendar days of a request i) all books, data, records, maps, plans, GIS data files, billings, payments, and submissions to the State relating to the User's Facilities and their function, location, income, history, maintenance, and repair, and ii) filings with the State Public Service Commission and the Federal Communications Commission. The documents shall be provided within a reasonable period of time after the filing date, such date not to exceed 30 days. The Town may examine all such information at no cost. If information is copied for the Town, the costs of copying, if any, shall be limited to the actual charges of a commercial copying Facility selected by the Town.

H. *Declaration of forfeiture.* The Town may declare the forfeiture of an Authorization, permit, License or Franchise, and all of the rights arising thereunder, in the event the holder continues not to comply with any material provision(s) of its Authorization, permit, License or Franchise, or is in substantial violation of this Ordinance or other standards adopted by the Town after due and proper notice and reasonable opportunity to cure or remedy. The Town shall give the holder at least thirty (30) calendar days' written notice of its intent to declare a forfeiture, which notice shall include a description of the non-compliant matter and the specific citation(s) at issue. The User shall then have thirty (30) days from receipt of the Town's notice to cure the non-compliance or to make verifiable substantial progress toward such cure, as determined in the reasonable discretion of the Town.

Section 11. Applications for Support Structures/Poles, Equipment and Equipment Housings and Modifications of Facilities located in the PROW:

A. *Application Required*: An Application must be filed with the Town Administrator for any work other than normal maintenance on any pole or other support structure, including modification, change or replacement of equipment that would be different in size, weight or appearance than the existing equipment.

B. An Application to Modify or replace a Facility shall contain a copy of the last Certificate of Completion issued for that Facility.

C. *False or Misleading Statements.* During the application process, or in an application, an Applicant may not make statement(s) verbally or in writing that is intended to be relied upon by the Town and is fraudulent, misleading or that causes or are intended to cause a reasonable probability of confusion or misunderstanding as to the legal rights, obligations, or options of the Town, nor fail to inform the Town of a relevant fact material to the application that is known or should be known by the Applicant, the omission of which is deceptive or misleading .

D. *Urgency.* An Applicant shall not misrepresent the urgency of the work represented in an Application, including any asserted deadline by which action by the Town on the Application is needed.

E. *Processing Urgent Requests.* The Town shall attempt to process urgent requests sooner than the required maximum time allowed by State or federal law. Notwithstanding the preceding, due to the effects of having to re-allocate human resources to accommodate such urgent requests, an Applicant shall not misrepresent the urgency of the situation to have a Facility(s) permitted or authorized. It shall be a condition of all Authorizations for an application requesting urgent treatment that the work shall be completed within ninety (90) calendar days of the issuance of the Authorization or pay a penalty of $100 per day per Facility until the final inspection is requested, except for force majeure situations and situations not reasonably within the control of the Applicant.

F. *Warehousing of Authorizations and permit(s) not allowed.* Warehousing of an Authorization shall never be permitted. To prevent Warehousing of Authorizations and/or permit(s) for new structures in the severely limited and scarce space of the PROW and on existing poles, thereby preventing another person or entity from using a given location(s) and space because the proposed structure at the location was not built expeditiously, an application shall contain a proposed date for the completion of the construction or Modification of any structure, including the placement of equipment attached to or associated with the structure. The completion date shall not be more than one-hundred-eighty (180) days after the issuance of a building permit to occupy a given location and space.

G. *Site Visit*: Prior to the submittal of an application and following payment of any required fee(s) or anticipatory deposits , a site visit to each Facility proposed to be Modified or to the proposed location of a new Facility, shall be conducted to determine i) the physical condition of the Facility or proposed location; and ii) to identify issues of concern, non-compliance with applicable laws, rules and regulations, including but not limited to any safety-related issues or concerns and other matters contained in this Ordinance.

H. *Number of Facilities Applied for by a given person or entity*: Due to limited staff resources, to prevent forced de facto pro-forma or rubber-stamping approval of an application without meaningful review for compliance with applicable federal, State and local law and regulations, and to prevent inadvertent non-compliance by the Town with any federal or state-imposed time requirements for reviewing an application, no person or entity may make application for more than ten (10) Facilities or locations under this Ordinance within any thirty (30) consecutive calendar day period.

I. Facilitating Applications and Mitigating Applicant Costs:

(1) To facilitate the preparation and submittal of an application in compliance with this Ordinance, and thereby expedite the review and permitting of an application, a pre-application meeting shall be held, the Town's costs for such being paid for by the Applicant prior to the meeting.

(2) To facilitate the application process and to mitigate application-related costs for Applicants, depending upon the scope of the proposed work and its impact both visual and physical as determined by the Town Administrator, applications not involving new support structures may be submitted in groups of up to three (3) Facilities in a single consolidated application and be subject to only one (1) application fee. Notwithstanding this, no Application for a new or replacement pole or other support structure shall contain more than a single location or Facility.

J. *No Unidentified Facilities*: No Authorization shall be granted for new support structures, new equipment or a new Facility that is not expressly and individually identified at the time the application is filed, including the specific location and design characteristics of each Facility.

K. *No Taxpayer Subsidization*: Historic, current and anticipated Subscriber rates for services provided using the PROW are assumed to reflect permitting costs, unless verifiable clear and convincing evidence to the contrary is provided. Therefore, Town funds shall not directly or indirectly be used subsidize an Applicant's reasonable application-related review and permitting costs.

L. *Application Fee*: To prevent taxpayer subsidization of application-related costs, an Application Fee shall be required of all Applications involving i) a new or replacement pole(s) or support structure(s); or ii) any modification of a Facility; or iii) any change of existing equipment attached to an existing pole(s) or support structure(s) that is visually discernable, changes the appearance of the Facility, changes the structural loading on the pole or support structure, or involves verification of compliance with an aspect of the National Electrical Safety Code (NESC), the National Electrical Code (NEC) or TIA ANSI 222 not previously applicable to that Facility. The amount of the appropriate Application Fee shall be as set forth in the Town's Schedule of Fees.

M. *Payment for Legal and/or Expert Assistance*: To prevent taxpayer subsidization of application-related costs as required by this Ordinance and determined to be appropriate and necessary by the Town Administrator, Applicants may be required to place on deposit with the Town an amount estimated to be sufficient to pay for reasonable legal and/or other expert assistance costs of the Town attributable to the Application. The minimum amount(s) required shall be as set forth in the Town's Schedule of Fees.

N. *Deposit Required Prior to Work on Application*. An Applicant must deposit the estimated cost of the Town's legal or other expert assistance with the Town prior to any work being done related to an application or an anticipated or intended application. Notwithstanding the preceding,

inquiries totaling up to one (1) hour of time may be made prior to the required deposit being in place at no cost to the Applicant.

O. *Return of Unexpended Amount of Deposit.* Any unexpended amount submitted in compliance with the preceding §(M) of this Section remaining after the issuance of a Certificate of Completion shall be promptly returned to the Applicant upon written request.

P. *Street opening, street cutting, curb and sidewalk cutting Fee*: Any person or entity proposing to cut or break the integrity of the surface of a paved street, sidewalk, pedestrian or bicycle way, or who proposes to cut any curb shall:

1) pay to the Town a fee(s) as set forth in the Town's schedule of fees prior to the issuance of any permit(s); and

2) obtain a permit for the proposed type of work.

Section 12. New and Replacement Poles within Rights-of-Ways – Required Design Characteristics.

A. Required Design Characteristics. Pursuant to the Town's Right-of-Way regulations, the following shall govern new poles and other support structures in the Rights-of-Way.
   a. Wireless installations shall be consistent throughout the Town limits and the extraterritorial jurisdiction (ETJ);
   b. Wireless installations shall only be on inert, non-conductive poles or structures;
   c. All antennas shall not be easily recognizable as an antenna by an average person from 250 feet away;
   d. Wireless installations shall utilize a "concealed" design, including all cabling being inside a hollow pole;
   e. All radios, network equipment and batteries will be enclosed in a pedestal cabinet near the pole, or in a pole-mounted cabinet or under a pole-mounted shroud or other location deemed appropriate under the facts and circumstance that is not technologically impracticable;
   f. Cabinets, if used, should be consistent in size and no larger than standard DOT streetlight signal cabinets;
   g. Unless proven unfeasible by clear and convincing evidence, in lieu of installing new poles, any wireless installation in the PROW shall replace a pre-existing distribution pole, secondary pole or streetlight;
   h. Wireless installations shall be on poles that meet or exceed current NESC standards and wind and ice loading requirements of ANSI 222 Version G; and
   i. To avoid unsightly rust and corrosion, any new or replacement pole installed shall not be made of metal or concrete.

B. Antennas attached to new poles or structures in the PROW shall be of a type that disguises the fact that they are antennas, unless for reasons proven by verifiable clear and convincing evidence that to do so is technologically impracticable, in which case a Best-Case type of camouflaging shall be used;

C. Where not technologically or Commercially Impracticable, equipment attached to poles in the PROW shall utilize a "concealed" design, including all cabling and any antennas being placed inside the pole or support structure;

D. So as to avoid an Applicant having to bear the cost of doing an Environmental Assessment and report as otherwise required by FCC Rule 14-153, any ground-mounted equipment enclosures shall be i) no larger than is technologically Necessary, but in no case larger than seventeen (17) cubic feet in volume for all users of the equipment shelter cumulatively; ii) of a color determined by the Town Administrator to be harmonious with the particular area; iii) located as near the pole as applicable safety codes allow; and iv) screened with evergreen shrubbery of sufficient size to hide the equipment shelter and, v) if the PROW is landscaped with decorative vegetation, of the same species, color, size and shape as is used to landscape the PROW in the neighborhood of the pole or enclosure;

E. Pole-mounted cabinets shall be as small as possible, but no larger than is technologically Necessary and reasonably possible, and shall be shielded from view in both directions parallel to the PROW by decorative, non-commercial banners or under a pole-mounted shroud;

F. Unless proven to be physically unfeasible or Commercially Impracticable by verifiable clear and convincing evidence, any person proposing a new attachment to an existing wooden primary electrical distribution pole, wooden secondary electrical distribution pole or wooden streetlight in the PROW shall, instead, replace the existing pole with a pole as described in this subsection;

G. All new poles shall meet or exceed current NESC standards and wind and ice loading requirements of the latest version of ANSI 222 Version G.

Section 13. Mailbox Obstructions

The Town shall not be responsible for the repair or replacement of any mailbox placed within any PROW. However, to alleviate the possibility of damage due to snow removal and vehicular traffic, the following guidelines shall be complied with:

A. Mailboxes shall be erected so that the front of a curbside box is set back at least 12 inches from the face of the concrete curb and the structure supporting the box must not encroach on this setback distance.

B. The bottom of a mailbox must be between 42 inches and 48 inches above the finished road surface.

C. Mailboxes and the standards or posts upon which they are erected must be designed and installed to withstand the impact of snow hurled from a passing snowplow.

D. Mailboxes shall not overhang a public sidewalk or pedestrian way.

Section 14. Relief

A. Any Applicant desiring relief, waiver or exemption from any aspect or requirement of this Ordinance shall address and identify such at the Pre-Application meeting and the relief or exemption shall be contained in the submitted Application. Requested relief may be temporary or permanent, partial or complete in nature.

B. The burden of justifying the Need or appropriateness of the requested relief, waiver or exemption shall be solely on the Applicant.

C. The Applicant shall bear all costs of the Town in considering the request for the relief, waiver or exemption.

D. Relief, waiver or exemption shall be based on the Applicant's demonstrated Need or appropriateness as evidenced by verifiable clear and convincing evidence satisfactory to the Town Administrator that, if granted, the relief, waiver or exemption will have no significant negative effect on the health, safety or welfare of the Town, its residents and other Users of the PROW, the Town Administrator must find the following:

(1) The proposed special use conforms to the character of the neighborhood, considering the location, type and height of existing buildings or structures and the type and extent of vegetation on the site.

(2) The proposed use will not cause undue traffic congestion or create a traffic, pedestrian or bicycle hazard.

(3) Adequate utilities are available.

(4) The proposed use shall not be noxious or offensive by reason of vibration, noise, odor, dust, smoke or gas.

(5) The proposed Facility and use shall not impede the orderly development and improvement of surrounding property for uses permitted within the applicable zoning district.

(6) The new structure or modification will not reasonably be expected to substantially diminish the value of adjoining or abutting property.

(7) The proposed use is consistent with the officially adopted plans and policies of the Town.

Section 15. Termination

In addition to all other rights and powers reserved by the Town, the Town reserves the right to terminate a permit and all rights and privileges of a permit holder for any of the following reasons:

A. A permit holder fails or refuses, after 30 days' prior written notice, to comply with any of the material provisions of the permit or this Ordinance.

B. A permit holder becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt.

C. All or part of a permit holder's facilities are sold under an instrument to secure a debt and are not redeemed by the permit holder within 90 days from such sale.

D. A permit holder attempts to or does practice any fraud or deceit in its conduct or relations with the Town under the permit.

E. The Town condemns all of the property of a permit holder within the Town by the lawful exercise of eminent domain.

F. The permit holder abandons its facilities and does not use them for the intended purpose for which Authorization was granted for ninety (90) consecutive calendar days.

Section 16. Severability

A. If any word, phrase, sentence, part, section, subsection, or other portion of this Ordinance, or any application thereof to any person or circumstance, is declared void, unconstitutional or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this Ordinance, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

B. If any word, phrase, sentence, part, section, subsection, or other portion of any Franchise or License issued pursuant to this Ordinance, or any application thereof to any person or circumstance, is declared void, unconstitutional or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of the Franchise or License, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

Sponsored by: Kevin R. Utz, Mayor
Dr. Robert Wack, Council President

ORDINANCE NO. 868 (AMENDED BY INTERLINEATION)

AN ORDINANCE AMENDING THE CITY OF WESTMINSTER CODE, CHAPTER 139, "STREETS AND SIDEWALKS", ARTICLE VI, "EXCAVATIONS", TO PROVIDE THAT PERMITS, RIGHT-OF-WAY PROTECTION AND RESTORATION, AND COMPENSATION ARE REQUIRED FOR INSTALLATION OF COMMUNICATIONS FACILITIES ON CITY STREETS, SIDEWALKS AND OTHER RIGHTS-OF-WAY,AND TO PROVIDE FOR THE POSTING OF BONDS IN THE CASE OF CERTAIN INSTALLATIONS

WHEREAS, pursuant to Md. Code Ann., Local Gov't. Article, § 5-202, the City of Westminster, Maryland ("the City"), has the authority to pass such ordinances as it deems necessary to assure the good government of the City; protect and preserve the City's rights, property, and privileges; and preserve peace and good order; and

WHEREAS, pursuant to the aforestated authority, the City has adopted Chapter 139, "Streets and Sidewalks," Article VI, "Excavations," of the City Code to protect the integrity of City streets, sidewalks, other rights-of-way and public places; and

WHEREAS, the primary purpose of the City's streets, sidewalks and other rights-of-way is to accommodate vehicular and pedestrian traffic; and

WHEREAS, the City's streets, sidewalks and other rights-of-way contain a finite amount of space and cannot therefore safely and responsibly accommodate the installation of an unlimited amount of utility and communications facilities and infrastructure; and

WHEREAS, the City has a legitimate interest in ensuring that third parties proposing to install, construct and maintain facilities in the City's streets, sidewalks and other rights-of-way do so responsibly, without interfering with existing facilities and infrastructure, without

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imposing a burden or safety risk upon pedestrian or vehicular traffic, and without imposing a burden on the City and its taxpayers for the costs of restoration of disturbed areas; and

WHEREAS, the City has recently, at significant cost, installed fiber communications facilities in its rights of way, in the uninterrupted function and integrity of which the City has a significant and valid interest; and

WHEREAS, the City desires to accommodate the safe, non-burdensome and efficient deployment of wireless facilities and support structures in the City's streets, sidewalks and other rights-of-way;

Section 1. NOW THEREFORE BE IT ORDAINED AND ENACTED by the Mayor and Common Council of Westminster, that Chapter 139, "Streets and Sidewalks," Article VI, "Excavations," of the Westminster City Code, § 139-25 through 135-29 be and hereby are amended to read as follows:

Article VI. Installations and Excavations.

§ 139-25. Permit required.

It shall be unlawful for any person to dig up, underbore, install any facilities or structure, or otherwise occupy any area within, above or below any part of the public streets, sidewalks or other rights of way or public places of the City, for the purpose of putting down, laying or installing gas or water pipes, cellar or other drains, fiber optic conduit or cabling, wireless facilities or support structures, or any other utility or communications facilities, without first having applied for and obtained a permit from the Public Works Director for that purpose. Any

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such person shall pay to the City a permit fee in the amount provided in the General Fee Ordinance. Nothing in this Chapter shall affect or limit the City's right to charge a separate fee for access to or the use of City-owned property or facilities.

§ 139-26. Permit limitations.

Any permit granted pursuant to this Chapter shall be in addition to, and not in lieu of, any fee, rent, lease, license or franchise required to occupy, or place facilities on or to attach to, City property, facilities or rights-of-way.

§ 139.27. Construction plan.

An applicant for a permit under this Chapter shall provide information specified by the Director demonstrating the intended scope of the installation and the expected placement of facilities addressed under this Chapter.

§ 139-27.1. Filling and restoring surface.

Each holder of a permit issued pursuant to this article shall, within the period of time specified in such permit or, if no time limit is specified therein, within 10 days after completion of the work authorized by the permit, adequately refill with the same type of material as had been removed or with other materials approved by the Public Works Director, without disturbing or damaging existing City infrastructure, and restore the surface of the place so excavated to as good condition as it was before such excavation was made, and upon failure to do so within the time required, such person shall be guilty of [an offense] a municipal infraction subject to a fine of $1,000.00.

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§ 139-27.2. Bond or deposit.

A. Prior to the issuance of any permit required by this article, the Public Works Director may require the applicant to give bond with corporate surety, payable to the City, in such amount as may be considered by the Public Works Director to be adequate to cover the costs and expenses of filling the authorized excavation and restoration of the surface of the place excavated to as good condition as it was prior to the excavation and conditioned upon the applicant's compliance with § 139-27.1, but in lieu of such bond, a cash deposit with the City Treasurer for such purpose shall be acceptable.

B. Notwithstanding the provisions of subsection A of this section, in the case of any application to excavate, underbore or otherwise disturb any City street, sidewalk or right-of-way in which any City-owned utilities, fiber, or conduit are located, the applicant shall post a bond in the amount of 110% of the cost of the work that is the subject of the permit to repair any direct, indirect, or incidental damage to City facilities or infrastructure, to fill any excavation, and to restore the surface of the disturbed area. The posting of such bond shall not excuse the permit holder from liability for the entire cost of any such necessary repairs or restoration and shall be in addition to permit fee imposed by the City pursuant to § 139-25 of this Chapter.

§ 139-27.3. Safety measures during construction.

From the time any installation or excavation is begun pursuant to a permit required by this article until completion of the work and restoration of the area where the installation or

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excavation took place, the permit holder shall be responsible for the installation and maintenance of adequate safeguards to protect persons, animals and property from the dangers directly or indirectly arising from all work done with respect to such installation or excavation, and the following safeguards, among others, which may be necessary or appropriate, shall be mandatory: warning signs, adequate illumination at night and during other periods of darkness or poor visibility and enclosure of the place of excavation or installation by barricades, rope or other suitable fixtures.

§ 139-28.1. Wireless Facilities and Support Structures.

A. The installation of wireless facilities and support structures in the City rights-of-way shall require a permit under this article. No permit shall be issued with respect to the installation of wireless facilities and support structures in or on any City street, sidewalk, or right-of-way unless and until the permit applicant and the City parties have negotiated and executed a franchise or right-of-way use agreement setting forth the terms and conditions, including providing for fair compensation to the City for the applicant's use of its rights of way, and where applicable, lease payments for the use of any City-owned poles or facilities.

~~A.~~B. An applicant for such a permit shall submit the following information pertaining to particular sites or a proposed deployment:

(1) a technical description of the proposed facilities, along with detailed diagrams accurately depicting all proposed facilities and support structures;

(2) a detailed deployment plan describing construction planned for the 12-month period

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following the permit, and a description of the completed deployment;

(3) an engineering certification relating to the proposed construction;

(4) a statement relating to collocation;

(5) a statement demonstrating the permittee's duty to comply with applicable safety standards for the proposed activities in the City rights-of-way;

(6) in the case of a proposed attachment to a City-owned facility located in the City rights-of-way, an executed attachment agreement with the City;

(7) in the case of a proposed attachment to an investor-owned utility pole in the rights-of-way, proof of the existence of an executed attachment agreement with the utility pole owner, setting forth at a minimum the title, date and term of the agreement and signed by the pole owner or authorized representative thereof; and

(8) such other information as the Director may require.

§ 139-28.2. Wireless facilities requirements and findings.

A. Wireless facilities and support structures proposed to be located on City streets, sidewalks or other rights-of-way shall meet the following requirements:

(1) Absent a special finding by the Director, wireless facilities may only be installed on existing utility poles or light poles, and only entities certificated by the Maryland Public Service Commission pursuant to Md. Code Ann., Public Services and Utilities Art., Division I, Title 7 or Title 8, may erect new poles in the City's right-of-way.

(2) Any new pole installed in City rights-of-way to support wireless facilities shall:

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(a) comply with all structural and safety standards specified by the Director;

(b) not obstruct pedestrian or vehicular traffic flow or sight lines;

(c) not exceed 60 feet in height;

(d) shall be designed to accommodate the collocation of at least three (3) different wireless providers' antennas and related equipment;

(e) if metal, be treated or painted with non-reflective paint, and in a way to conform to or blend into the surroundings; and

(f) comply with such other requirements and conditions as the Director may conclude are appropriate to impose.

(3) Any wireless facilities installed on a pole or any other structure in the rights-of-way shall:

(a) have equipment box or boxes no greater in collective size than 24 cubic feet in volume, provided that neither the width nor the depth of any box may exceed 2 linear feet;

(b) have panel antennas no greater than 2 feet in height, and omni/dome antennas no more than 4 feet in height, and no wider than the 16" in diameter;

(c) have no more than 3 panel antennas per pole, and no more than one omni/dome antenna per pole;

(d) have microwave dishes no greater than 2 feet in diameter, with no more than 3 microwave dishes per pole;

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(e) be treated or painted with non-reflective paint, and in a way to conform to or blend into the pole or the surroundings; and

(f) comply with such other requirements and conditions as the Director may conclude are appropriate to impose.

B. Wireless facilities and support structures proposed to be located on City streets, sidewalks or other rights-of-way may be permitted upon a finding by the Director that:

(a) the application complies with all standards and requirements set forth in § 139.28.2(A);

(b) the location selected in the application is not in an area where there is an over-concentration of poles or other facilities in, on or over the streets, sidewalks or other rights-of-way; and

(c) the location selected, and scale and appearance of the wireless facilities and support structures to be installed, are consistent with the principles and goals of Chapter 164 of the Code.

§ 139-29. Exceptions.

A. No City permit shall be required under this article to excavate any portion of a street [which] that is a part of the State Highway system and for which a state permit is required under the provisions of Md Code Ann., Transportation, § 8-646 (2015).

B. No permit shall be issued with respect to any City street, sidewalk, or right-of-way where, in the judgment of the Public Works Director, sufficient capacity no longer exists for

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additional facilities to be placed in the proposed location without jeopardizing (1) the physical integrity of utilities or other facilities already present in the proposed location, or (2) the safe and efficient vehicular or pedestrian use of the street, sidewalk, or right-of-way.

Section 2. Be it further enacted and ordained by The Mayor and Common Council of Westminster that this Ordinance shall take effect (10) ten days after its passage and approval.

INTRODUCED this 8th day of August, 2016.

David J Deutsch
David J. Deutsch, Interim City Administrator

PASSED this 22nd day of August 2016.

David J Deutsch
David J. Deutsch, Interim City Administrator

APPROVED this 22nd day of August 2016.

Kevin R. Utz, Mayor

APPROVED AS TO FORM AND SUFFICIENCY
this 22 day of August, 2016:

Elissa D. Levan, City Attorney

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Ordinance No. _____

SMALL CELL ANTENNA/TOWER RIGHT-OF-WAY SITING ORDINANCE

WHEREAS, the **City** of _____ (the "**City**") is an Illinois municipality in accordance with the Constitution of the State of Illinois of 1970; and,

WHEREAS, the **City** is authorized under the Illinois Municipal Code, 65 ILCS 5/1-1-1 et seq., and Illinois law to adopt ordinances pertaining to the public health, safety and welfare; and,

WHEREAS, the **City** is further authorized to adopt the amendments contained herein pursuant to its authority to regulate the public right-of-way under section 11-80-1 et seq., of the Illinois Municipal Code; and

WHEREAS, the **City** uses the public right-of-way within its **City** limits to provide essential public services to its residents and businesses. The public right-of-way within the **City** is a limited public resource held by the **City** for the benefit of its citizens and the **City** has a custodial duty to ensure that the public right-of-way is used, repaired, and maintained in a manner that best serves the public interest; and

WHEREAS, growing demand for personal wireless telecommunications services has resulted in increasing requests nationwide and locally from the wireless industry to place small cell facilities, distributed antenna systems, and other personal wireless telecommunication facilities on utility and street light poles and other structures in the public right-of-way. While State and federal law limit the authority of local governments to enact laws that unreasonably discriminate among providers of functionally equivalent services, prohibit, or have the effect of prohibiting the provision of telecommunications services by wireless service providers, the **City** is authorized, under existing State and federal law, to enact appropriate regulations and restrictions relative to small cell facilities, distributed antenna systems, and other personal wireless telecommunication facility installations in the public right-of-way; and

WHEREAS, in anticipation of continued increased demand for placement of small cell facilities, distributed antenna systems, and other personal wireless telecommunication facility installations within the public right-of-way, the **City Council** finds that it is in the best interests of the public health, safety and general welfare of the **City** to adopt the ordinance below in order to establish generally applicable standards for construction, installation, use, maintenance and repair of such facilities, systems and installations within the public right-of-way in the **City** so as to, among other things: (i) prevent interference with the facilities and operations of the **City's** utilities and of other utilities lawfully located in public right-of-way or property, (ii) provide specific regulations and standards for the placement and siting of personal wireless telecommunication facilities within public right-of-way in the **City**, (iii) preserve the character of the neighborhoods in which facilities are installed, (iv) minimize any adverse visual impact of personal wireless telecommunication facilities and prevent visual blight in the neighborhoods in which facilities are installed, (v) facilitate the location of personal wireless telecommunication facilities in permitted locations within the public right-of-way in the **City**, and (vi) assure the continued safe use and enjoyment of private properties adjacent to personal wireless telecommunication facilities.

NOW, THEREFORE, be it ordained by the corporate authorities of the **City** of **[FILL IN BLANK]** as follows:

SECTION 1:

Definitions.

For purposes of this Ordinance, the following terms will have the following meanings:

ALTERNATIVE ANTENNA STRUCTURE	An existing pole or other structure within the public right-of-way that can be used to support an antenna and is not a utility pole or a **City**-owned infrastructure.
ANTENNA	Communications equipment that transmits or receives electromagnetic radio signals used in the provision of any type of wireless communications services.
APPLICANT	Any person or entity submitting an application to install personal wireless telecommunication facilities or structures to support the facilities within a public right-of-way.
CITY-OWNED INFRASTRUCTURE	Infrastructure in public right-of-way within the boundaries of the **City**, including, but not limited to, streetlights, traffic signals, towers, structures, or buildings owned, operated or maintained by the **City**.
DISTRIBUTED ANTENNA SYSTEM (DAS)	A type of personal wireless telecommunication facility consisting of a network of spatially separated antenna nodes connected to a common source via a transport medium that provides wireless service within a geographic area. Generally serves multiple carriers.
LANDSCAPE SCREENING	The installation at grade of plantings, shrubbery, bushes or other foliage intended to screen the base of a personal wireless telecommunication facility from public view.
MONOPOLE	A structure composed of a single spire, pole or tower designed and used to support antennas or related equipment and that is not a utility pole, an alternative antenna structure, or a **City**-owned infrastructure.
PERSONAL WIRELESS TELECOMMUNICATION ANTENNA	An antenna that is part of a personal wireless telecommunications facility.
PERSONAL WIRELESS TELECOMMUNICATION EQUIPMENT	Equipment, exclusive of an antenna, that is part of a personal wireless telecommunications facility.
PERSONAL WIRELESS TELECOMMUNICATIONS FACILITY	An antenna, equipment, and related improvements used, or designed to be used, to provide wireless transmission of voice, data video streams, images, or other information including, but not limited to, cellular phone service, personal communication service, paging, and Wi-Fi antenna service.

SMALL CELL FACILITIES	A Personal Wireless Telecommunications Facility consisting of an antenna and related equipment either installed singly or as part of a network to provide coverage or enhance capacity in a limited defined area. Generally single-service provider installation.
TOWER	Any structure that is designed and constructed primarily for the purpose of supporting one or more antennas, including self-supporting lattice towers, guy towers, or monopole towers, and that is not a utility pole, an alternative antenna structure, or a **City-**owned infrastructure. Except as otherwise provided for by this Ordinance, the requirements for a tower and associated antenna facilities shall be those required in this Ordinance.
UTILITY POLE	An upright pole designed and used to support electric cables, telephone cables, telecommunication cables, cable service cables, which are used to provide lighting, traffic control, signage, or a similar function.
VARIANCE or VARIATION	A grant of relief by the **City Manager/Administrator** or his/her designee.
WI-FI ANTENNA	An antenna used to support Wi-Fi broadband Internet access service based on the IEEE 802.11 standard that typically uses unlicensed spectrum to enable communication between devices.

SECTION 2:

Standards and Regulations.

Personal wireless telecommunication facilities will be permitted to be placed in right-of- way within the jurisdiction of the **City** as attachments to existing utility poles, alternative antenna structures, or **City**-owned infrastructure subject to the following regulations:

A. *Number Limitation and Co-Location*. The **City Manager/Administrator** or his/her designee may regulate the number of personal wireless telecommunications facilities allowed on each utility pole or unit of **City**-owned infrastructure. No more than two (2) personal wireless telecommunications facilities will be permitted on utility poles or Alternative Antenna Structure of **ninety (90)** feet or less. No more than three (3) personal wireless telecommunications facilities will be permitted on utility poles or Alternative Antenna Structures in excess of **ninety (90)** feet and less than **one-hundred and twenty (120)** feet. This Ordinance does not preclude or prohibit co-location of personal wireless telecommunication facilities on towers or monopoles that meet the requirements as set forth elsewhere in this section or as required by federal law.

B. *Separation and Clearance Requirements*. Personal wireless telecommunication facilities may be attached to a utility pole, alternative antenna structure, monopole, or **City**-owned infrastructure only where such pole, structure or infrastructure is located no closer than a distance equal to one hundred (100) per cent of the height of such facility to any residential building and no closer than **three hundred (300)** feet from any other personal wireless telecommunication facility. A separation or lesser clearance may be allowed by the **City Manager/Administrator** or his/her designee as an administrative variance to this Ordinance when the Applicant establishes that the lesser separation or clearance is necessary to close a significant coverage or capacity gap in the Applicant's services or to otherwise provide adequate services to customers, and the proposed antenna or facility is the least intrusive means to do so within the right-of-way.

C. **City**-*Owned Infrastructure*. Personal wireless telecommunication facilities can only be mounted to **City**-owned infrastructure including, but not limited to, streetlights, traffic signal, towers or buildings, if authorized by a license or other agreement between the owner and the **City**.

D. *New Towers.* No new monopole or other tower to support personal wireless telecommunication facilities in excess of **sixty (60) feet** is permitted to be installed on right-of-way within the jurisdiction of the **City** unless the **City Council** finds, based on clear and convincing evidence provided by the applicant, that locating the personal wireless telecommunications facilities on the right-of-way is necessary to close a significant coverage or capacity gap in the Applicant's services or to otherwise provide adequate services to customers, and the proposed new monopole or other tower within the right-of-way is the least intrusive means to do so.

E. *Attachment Limitations*. No personal wireless telecommunication antenna or facility within the right-of-way will be attached to a utility pole, alternative antenna structure, tower, or **City**-owned infrastructure unless all of the following conditions are satisfied:

1. Surface Area of Antenna: The personal wireless telecommunication antenna, including antenna panels, whip antennas or dish-shaped antennas, cannot have a surface area of more than **seven (7)** cubic feet in volume.

2. Size of Above-Ground Personal Wireless Telecommunication Facility: The total combined volume of all above-ground equipment and appurtenances comprising a personal wireless telecommunication facility, exclusive of the antenna itself, cannot exceed **thirty-two (32)** cubic feet.

3. Personal Wireless Telecommunication Equipment: The operator of a personal wireless telecommunication facility must, whenever possible, locate the base of the equipment or appurtenances at a height of no lower than **eight (8)** feet above grade.

4. Personal Wireless Telecommunication Services Equipment Mounted at Grade: In the event that the operator of a personal wireless telecommunication facility proposes to install a facility where equipment or appurtenances are to be installed

at grade, screening must be installed to minimize the visibility of the facility. Screening must be installed at least **three (3)** feet from the equipment installed at-grade and **eight (8) feet** from a roadway.

5. Height: The top of the highest point of the antenna cannot extend more than **seven (7)** feet above the highest point of the utility pole, alternative antenna support structure, tower or **City**-owned infrastructure. If necessary, the replacement or new utility pole, alternative support structure or **City**-owned infrastructure located within the public right-of-way may be no more than **ten to seventy (10 – 70)** feet higher than existing poles adjacent to the replacement or new pole or structure, or no more than **ninety (90)** feet in height overall, whichever is less.

6. Color: A personal wireless telecommunication facility, including all related equipment and appurtenances, must be a color that blends with the surroundings of the pole, structure tower or infrastructure on which it is mounted and use non-reflective materials which blend with the materials and colors of the surrounding area and structures. Any wiring must be covered with an appropriate cover.

7. Antenna Panel Covering: A personal wireless telecommunication antenna may include a radome, cap or other antenna panel covering or shield, to the extent such covering would not result in a larger or more noticeable facility and, if proposed, such covering must be of a color that blends with the color of the pol, structure, tower or infrastructure on which it is mounted.

8. Wiring and Cabling: Wires and cables connecting the antenna to the remainder of the facility must be installed in accordance with the electrical code currently in effect. No wiring and cabling serving the facility will be allowed to interfere with any wiring or cabling installed by a cable television or video service operator, electric utility or telephone utility.

9. Grounding: The personal wireless telecommunication facility must be grounded in accordance with the requirements of the electrical code currently in effect in the **City**.

10. Guy Wires: No guy or other support wires will be used in connection with a personal wireless telecommunication facility unless the facility is to be attached to an existing utility pole, alternative antenna support structure, tower or **City**-owned infrastructure that incorporated guy wires prior to the date that an applicant has applied for a permit.

11. Pole Extensions: Extensions to utility poles, alternative support structures, towers and **City**-owned infrastructure utilized for the purpose of connecting a personal wireless telecommunications antenna and its related personal wireless telecommunications equipment must have a degree of strength capable of supporting the antenna and any related appurtenances and cabling and capable of withstanding wind forces and ice loads in accordance with the applicable structural integrity standards as set forth in 12 below. An extension must be securely bound to the utility pole, alternative antenna structure, tower or **City**-

owned infrastructure in accordance with applicable engineering standards for the design and attachment of such extensions.

12. Structural Integrity: The personal wireless telecommunication facility, including the antenna, pole extension and all related equipment must be designed to withstand a wind force and ice loads in accordance with applicable standards established in Chapter 25 of the National Electric Safety Code for utility poles, Rule 250-B and 250-C standards governing wind, ice, and loading forces on utility poles, in the American National Standards Institute (ANSI) in TIA/EIA Section 222-G established by the Telecommunications Industry Association (TIA) and the Electronics Industry Association (EIA) for steel wireless support structures and the applicable industry standard for other existing structures. For any facility attached to **City**-owned infrastructure or, in the discretion of the **City**, for a utility pole, tower, or alternative antenna structure, the operator of the facility must provide the **City** with a structural evaluation of each specific location containing a recommendation that the proposed installation passes the standards described above. The evaluation must be prepared by a professional structural engineer licensed in the State of Illinois.

F. *Signage*. Other than signs required by federal law or regulations or identification and location markings, installation of signs on a personal wireless telecommunication facility is prohibited.

G. *Screening.* If screening is required under Section (c)(4) above, it must be natural landscaping material or a fence subject to the approval of the **City** and must comply with all regulations of the **City**. Appropriate landscaping must be located and maintained and must provide the maximum achievable screening, as determined by the **City**, from view of adjoining properties and public or private streets. Notwithstanding the foregoing, no such screening is required to extend more than **nine (9)** feet in height. Landscape screening when permitted in the right-of-way must be provided with a clearance of three (3) feet in all directions from the facility. The color of housing for ground-mounted equipment must blend with the surroundings. For a covered structure, the maximum reasonably achievable screening must be provided between such facility and the view from adjoining properties and public or private streets. In lieu of the operator installing the screening, the **City**, at its sole discretion, may accept a fee from the operator of the facility for the acquisition, installation, or maintenance of landscaping material by the **City**.

H. *Permission to Use Utility Pole or Alterative Antenna Structure*. The operator of a personal wireless telecommunication facility must submit to the **City** written copies of the approval from the owner of a utility pole, monopole, or an alternative antenna structure, to mount the personal wireless telecommunication facility on that specific pole, tower, or structure, prior to issuance of the **City** permit.

I. *Licenses and Permits.* The operator of a personal wireless telecommunication facility must verify to the **City** that it has received all concurrent licenses and permits required by other agencies and governments with jurisdiction over the design, construction, location

and operation of said facility have been obtained and will be maintained within the corporate limits of the **City**.

J. *Variance Requirements*. Each location of a personal wireless telecommunication facility within a right-of-way must meet all of the requirements of this Ordinance, unless a variance has been obtained in accordance with **[CROSS-REFERENCE TO VARIANCE PROCESS IN RIGHT-OF-WAY ORDINANCE OR ESTABLISHED VARIANCE PROCEDURE]**.

K. *Abandonment and Removal*. Any personal wireless telecommunication facility located within the corporate limits of the **City** that is not operated for a continuous period of twelve (12) months, shall be considered abandoned and the owner of the facility must remove same within ninety (90) days of receipt of written notice from the **City** notifying the owner of such abandonment. Such notice shall be sent by certified or registered mail, return-receipt-requested, by the **City** to such owner at the last known address of such owner. In the case of personal wireless telecommunication facilities attached to **City** owned infrastructure, if such facility is not removed within ninety (90) days of such notice, the **City** may remove or cause the removal of such facility through the terms of the applicable license agreement or through whatever actions are provided by law for removal and cost recovery.

Permits and Application Fees and Procedures.

Permits for placement of personal wireless telecommunication facilities in right-of-way within the **City** are required. Except as otherwise provided for by in this Ordinance, the procedures for the application for, approval of, and revocation of such a permit must be in compliance with **City** permit application requirements in **[INSERT CROSS-REFERENCE IN RIGHT-OF-WAY ORDINANCE]**. Any applications must demonstrate compliance with the requirements of this section. Unless otherwise provided by franchise, license, or similar agreement, or federal, State or local law, all applications for permits pursuant to this section must be accompanied by a fee in the amount of no less than **[INSERT AMOUNT]**. The application fee will reimburse the **City** for regulatory and administrative costs with respect to the work being performed.

Conflict of Laws.

Where the conditions imposed by any provisions of this Chapter regarding the siting and installation of personal wireless telecommunication facilities are more restrictive than comparable conditions imposed elsewhere in any other local law, ordinance, resolution, rule or regulation, the regulations of this Ordinance will govern.

SECTION 3:

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 4:

If any provision of this ordinance or application thereof to any person or circumstance is ruled unconstitutional or otherwise invalid, such invalidity shall not affect other provisions or applications of this ordinance that can be given effect without the invalid application or provision, and each invalid provision or invalid application of this ordinance is severable.

SECTION 5:

The findings and recitals herein are declared to be prima facie evidence of the law of the **City** and shall be received in evidence as provided by the Illinois Compiled Statutes and the courts of the State of Illinois.

SECTION 6:

That this Ordinance shall be in full force and effect on **[INSERT DATE]**, nunc pro tunc.

GVMC

GRAND VALLEY METROPOLITAN COUNCIL

ADA TOWNSHIP • ALGOMA TOWNSHIP • ALLENDALE TOWNSHIP • ALPINE TOWNSHIP • BELDING • BYRON TOWNSHIP • CALEDONIA TOWNSHIP • CANNON TOWNSHIP •CASCADE TOWNSHIP • CEDAR SPRINGS
COOPERSVILLE • COURTLAND TOWNSHIP • EAST GRAND RAPIDS • GAINES TOWNSHIP • GEORGETOWN TOWNSHIP • GRAND RAPIDS • GRAND RAPIDS TOWNSHIP • GRANDVILLE • GREENVILLE • HASTINGS
HUDSONVILLE • IONIA • JAMESTOWN TOWNSHIP • KENT COUNTY • KENTWOOD • LOWELL • LOWELL TOWNSHIP • MIDDLEVILLE • NELSON TOWNSHIP • OTTAWA COUNTY • PLAINFIELD TOWNSHIP
ROCKFORD • SPARTA • SAND LAKE • TALLMADGE TOWNSHIP • WALKER • WAYLAND • WYOMING

December 15, 2016

RE: GVMC DAS/Small Cell Wireless Guidance Packet

Greetings Community Leader:

Thank you for joining the efforts of the Grand Valley Metro Council to help develop reasonable and consistent regulation of DAS/Small Cell Wireless Facilities within your community.

As you may be aware, the METRO Act expressly provides that poles, supporting structures, antennae and ancillary equipment are not considered "telecommunications facilities" for purposes of that Act. Thus, obtaining a METRO Act permit does **not** entitle a DAS or other telecommunications provider to install poles and supporting infrastructure in the public rights of way.

In early 2016, many GVMC communities received applications for DAS facilities. Some were approved inadvertently under the METRO Act, some inadvertently under electrical permits and many were denied or put on hold.

An ad hoc committee of the GVMC was formed to further investigate the matter and establish a uniform permitting process for DAS/Small Cell Wireless Facilities. The committee objectives were to: (1) be business friendly, (2) create regional consistency, (3) be good stewards of the ROW, (4) recognize the need for increased cellular capacity and (5) recognize our individual community nuances (there is no one size fits all).

Nineteen communities financially backed this initiative and the following communities were represented on the working group: City of Kentwood, City of Wyoming, City of Coopersville, City of East Grand Rapids, Plainfield Township, Alpine Township, Cascade Township, Village of Middleville, Kent County Road Commission and the Grand Valley Metro Council. The team was strategically selected to cover a broad group of stakeholders.

Our primary legal representation was Jeff Sluggett from Bloom, Sluggett, Morgan PC, who attended all of the committee meetings and supporting legal reviews were performed my Mike Watza of the Kitch law firm.

The Deliverables of our efforts are contained within this packet:

1. Model ordinance to regulate DAS/Small Cell Wireless Facilities.
2. Model licenses for DAS/Small Cell Wireless Facilities.
3. Model fee guidance sheet
4. Model fee resolution.

Our process also brought Mobilitie, ACD and Verizon to the table to discuss their technology and gather their input on our documents, fees and approach. Thus, they are familiar with and have contributed to these deliverables.

In the spirit of cooperation, the GVMC board has recently voted to allow non-member communities to join the DAS group for $1500. All participants will receive copies of the deliverables and on-going legal updates at no additional cost. As the technology and the legal environment evolve we anticipate that there will be a need to institute on-going amendments to our documentation.

Thank you again for your participation. If you have questions on the deliverables please feel free to contact John Weiss at the GVMC or myself.

Sincerely.

Mark E. Rambo
Deputy City Administrator
City of Kentwood

Fee Structure Guidance: 12-15-16

The Ad Hoc committee recognizes that each community will have a unique culmination of administrative standards, zoning regulations and ROW conditions. The following fee structure was designed to provide a general framework for communities to follow when establishing rates.

For administrative and mapping consistency, it is recommended that the following tiers be used even if your community does not have areas that currently conform to the specific tiers listed.

Monthly License Fee Framework:

Tier 1:

- $25.00 Per Month Per Pole
- Applicability: Poles or facilities in rural, low traffic areas without existing infrastructure.
- Zoning Areas or Sections: Community Specific
- This tier would include all existing DAS or Small Cell Wireless poles installed without a license.
- Sample Metrics: County Road, no existing infrastructure,

Tier 2:

- $75.00 Per Month Per Pole
- Applicability: Poles or facilities in a residential or medium traffic area with moderate infrastructure.
- Zoning Areas or Sections: Community Specific
- Sample Metrics: Local street classification, Existing overhead infrastructure,

Tier 3:

- $150.00 Per Month Per Pole
- Applicability: Poles or facilities in a Commercial/Industrial area or downtown corridor. Medium to heavy traffic areas and dense infrastructure.
- Zoning Areas or Sections: Community Specific
- Sample Metrics: Major street classification, Existing underground infrastructure

Tier 4:

- Negotiable or No Fee
- Applicability:
    - Colocations: In an effort to support co-locations and reduce the number of poles and facilities within the public ROW, an alternative pay arrangement may be negotiated.
    - Improve Coverage Areas: In order to improve network connectivity in underserved areas of a community, an alternative pay arrangement may be negotiated.
    - Negotiable Services: Services in lieu of payment are intended to identify and allow a mutually beneficial arrangement outside of a direct cash payment by the licensee.
    - This tier is not intended to allow for a higher negotiated payment amount than those listed above.

Billing:

It is suggested that an annual invoice be sent to the telecommunications agency with payment totals and due dates. The telecommunications agencies vary in their billing practices. The Annual billing was recommended to reduce the administrative burden to the local community. The licenses is structured to be at the preference of the local community.

Performance Bonds:

It is suggested that a performance bond of $10,000 be utilized which matches the METRO Act.

Tiered Map:

It is suggested that your community create a street map indicating the various tiered fees. This should be included as Exhibit C in the fee resolution. For Example, the City of Kentwood (a predominantly urbanized area) has placed Major Streets at Tier 3 and Local Streets as Tier 2.

CITY/VILLAGE/TOWNSHIP/VILLAGE/TOWNSHIP OF _____
KENT COUNTY, MICHIGAN

ORDINANCE NO. _____

AN ORDINANCE TO AMEND _____ AND ADD A NEW SECTION _____ TO THE CODE OF ORDINANCES, CITY/VILLAGE/TOWNSHIP OF _____, MICHIGAN, TO REGULATE DAS/SMALL CELL/WIRELESS FACILITIES IN THE PUBLIC RIGHTS OF WAY

THE CITY/VILLAGE/TOWNSHIP/VILLAGE/TOWNSHIP OF _____ ORDAINS:

Section 1. Amendment to Add Section _____. Section _____, Chapter ____, Article __ of the Code of Ordinances, City/Village/Township of _____, Michigan, is hereby created to read as follows:

Section _____. DAS/SMALL CELL/WIRELESS FACILITIES IN THE PUBLIC RIGHTS OF WAY

(a) Definition. For purposes of this section, the following terms and phrases shall be defined as follows:

DAS/Small Cell/Wireless Network shall mean any distributed antennae system or small cell telecommunication or data wireless network.

DAS/Small Cell/Wireless Facilities or DAS/Small Cell/Wireless Network Facilities means structures of any nature installed and/or operated for the provision of telecommunication or wireless services, including without limitation, antennas, supporting structures for antennas, poles, equipment shelters or houses, and any ancillary equipment.

(b) License Agreement. No person shall install or operate, in whole or in part, DAS/Small Cell/Wireless Facilities or DAS/Small Cell/Wireless Network Facilities in a City/Village/Township public right-of-way or other public place without first applying for and receiving a DAS/Small Cell/Wireless license from the City/Village/Township in a form and subject to such terms and conditions as is acceptable to the City/Village/Township. Nothing herein shall be interpreted to require the City/Village/Township to issue such a license and the City/Village/Township reserves to itself discretion to grant, deny or modify a request for such a license as it determines to be in the best interest of the City/Village/Township and its citizens.

(c) METRO Act Permit. No person shall install or operate "telecommunications facilities," as defined in the Metropolitan Extension Telecommunications Rights-Of-Way Oversight Act,

Act No. 48 of the Public Acts of 2002, as amended (the "Act") without first obtaining a permit under the Act from the City/Village/Township, including any part of a DAS/Small Cell/Wireless system constituting telecommunication facilities.

(d) Design Parameters. Where permitted by the City/Village/Township, the following minimal design parameters shall apply to DAS/Small Cells/Wireless Network Facilities in City/Village/Township public rights-of-way:

1. The required map(s) for proposed DAS/Small Cell/Wireless Facilities shall be legible, to scale, labeled with streets, and contain sufficient detail to clearly identify the proposed DAS/Small Cell/Wireless Network Facilities' locations and surroundings. Where applicable, the required map or list shall include and identify any requested pole height(s).

2. The maximum height of a pole or other supporting structure installed to accommodate a DAS/Small Cell/Wireless Network shall be 40 feet.

3. Unless otherwise permitted in Section (d) 6., DAS/Small Cell/Wireless Facilities shall be located no closer than 18 inches from an existing sidewalk/face of curb or 18 inches from a proposed future sidewalk/face of curb location.

4. Unless otherwise permitted in Section (d) 6., DAS/Small Cell/Wireless Facilities shall be located no closer than 10 feet from any driveway.

5. In residential areas, DAS/Small Cell/Wireless Facilities shall be located in line with a side lot line whenever possible and not in front of a house.

6. The licensee shall field-stake all proposed locations for DAS/Small Cell/Wireless Facilities which shall be subject to the approval of the City/Village/Township, Kent County Road Commission and/or the Michigan Department of Transportation as applicable. All approved DAS/Small Cell/Wireless Facilities' locations shall be on a per pole/equipment/other basis. Such approvals shall be memorialized by the City/Village/Township and licensee.

7. Once precise locations have been approved in accordance with Section (d) 6., the licensee shall provide latitude and longitude coordinates for the DAS/Small Cell/Wireless Facilities' locations to the City/Village/Township's Engineering Department.

8. The licensee shall be responsible to obtain such other permits and approvals as required by law.

(e) Compliance with Applicable Law. The City/Village/Township, in reviewing and authorizing a permit under the Act and/or a license referred to in this section, and the licensee, in the

establishment and operation of any DAS/Small Cell/Wireless Network Facilities, shall comply with all applicable federal and state laws.

(f) Fees. Fees for the agreement and permits required shall be as provided for in the Act or those documents and as periodically authorized by resolution of the City/Village/Township Commission.

Section 2. Effective Date. This Ordinance will become effective 10 days following its publication in a newspaper in general circulation within the City/Village/Township as provided by law.

At a regular meeting held on _____, a motion was offered by _____, with support from _____, to approve the foregoing Ordinance No. _____.

YEAS: _____

NAYS: _____

ABSENT: _____

ORDINANCE NO. ___ ADOPTED.

_____
_____, _____

_____
_____, Clerk

I, _____, the Clerk of the City/Village/Township of _____, affirm that the foregoing is a true and accurate copy of an ordinance adopted by the City/Village/Township _____ of the City/Village/Township of _____ at a regular meeting held on _____, noticed and held in accordance with Michigan law.

_____
_____, Clerk

CITY/VILLAGE/TOWNSHIP/VILLAGE/TOWNSHIP OF _____
_____ COUNTY, MICHIGAN

Motion by _____, seconded by _____, to adopt the following resolution:

RESOLUTION NO. _____-___

A RESOLUTION TO ESTABLISH ADMINISTRATIVE AND MONTHLY FEES AND TO APPROVE A LICENSE AND TIERED MAP RELATIVE TO THE ISSUANCE OF DAS/SMALL CELL WIRELESS LICENSES

RECITALS

A. A Distributed Antenna Systems (DAS)/Small Cell Wireless network is composed of spatially separated antenna nodes that are connected to a common source by a medium that provides wireless service within a geographic area or structure.

B. Pursuant to Michigan law [and City/Village/Township ordinance], the City/Village/Township's public rights of way are a recognized and valuable public resource, entrusted to the City/Village/Township's citizens and taxpayers acting through the City/Village/Township _____.

C. Pursuant to Michigan law [and City/Village/Township ordinance], the City/Village/Township _____ is tasked with administering and managing the City/Village/Township's public rights of way in a reasonable manner and subject to reasonable oversight.

D. The City/Village/Township _____ desires to facilitate the availability of new technologies in a reasonable and uniform manner.

E. [The City/Village/Township has adopted an ordinance which makes express the need of a DAS/Small Cell Wireless provider to pay uniform fees for the privilege of installing and operating poles, antennas and accessory equipment in the public rights of way.]

F. The City/Village/Township _____ recognizes the need to compensate the City/Village/Township for the use of the City/Village/Township's public property and to regulate in a reasonable fashion the use its public rights of way for the general health, safety and welfare.

G. In cooperation with other communities in the metropolitan area, the City/Village/Township has studied and consulted with various stakeholders, including providers of DAS/Small Cell Wireless services, regarding a reasonable set of fees to be imposed for the use of the City/Village/Township's approved public rights of way and a method by which the City/Village/Township can exercise its proprietary rights.

H. Based on those studies and consultations the City/Village/Township has determined that the fees and charges as set forth in the attached Fee Structure, attached as Exhibit A hereto and incorporated by reference, are appropriate and should be utilized by the City/Village/Township in conjunction with the License, attached as Exhibit B hereto and incorporated by reference, in administering the placement and operation of DAS/Small Cell Wireless facilities in the City/Village/Township's public rights of way.

NOW THEREFORE IT IS RESOLVED:

1. The Recitals set forth above are acknowledged to be accurate and are hereby adopted as if fully set forth.

2. The Fee Structure attached as Exhibit A is hereby adopted and approved for the licensing of DAS/Small Cell Wireless networks [as authorized and permitted by City/Village/Township ordinance].

3. The DAS/Small Cell Wireless License Agreement template attached as Exhibit B is adopted and approved for use by City/Village/Township staff and the _____'s office.

4. The Tiered Map of the City/Village/Township, attached as Exhibit C hereto and incorporated by reference, is hereby adopted for purposes of determining the appropriate tiered monthly fees provided for in this Resolution and the License.

5. All resolutions and parts of resolutions in conflict herewith are, to the extent of such conflicts, hereby repealed.

YEAS: _____

NAY: _____

ABSENT: _____

RESOLUTION NO. ____ ADOPTED.

_____
_____
City/Village/Township Clerk

The foregoing resolution was adopted at a regular meeting of the City/Village/Township _____ of the City/Village/Township of _____ on _____, 2016.

_____
_____
City/Village/Township Clerk

EXHIBIT A
FEE STRUCTURE

Monthly License Fee Framework:

Tier 1:

- $25.00 Per Month Per Pole
- Applicability: Poles or facilities in rural, low traffic areas without existing infrastructure.
- Zoning Areas or Sections: Community Specific
- This tier would include all existing DAS or Small Cell Wireless poles installed without a license.
- Sample Metrics: County Road, no existing infrastructure,

Tier 2:

- $75.00 Per Month Per Pole
- Applicability: Poles or facilities in a residential or medium traffic area with moderate infrastructure.
- Zoning Areas or Sections: Community Specific
- Sample Metrics: Local street classification, existing overhead infrastructure,

Tier 3:

- $150.00 Per Month Per Pole
- Applicability: Poles or facilities in a Commercial/Industrial area or downtown corridor. Medium to heavy traffic areas and dense infrastructure.
- Zoning Areas or Sections: Community Specific
- Sample Metrics: Major street classification, existing overhead or underground infrastructure

Tier 4:

- Negotiable or No Fee
- Applicability:
    - Colocations: In an effort to support co-locations and reduce the number of poles and facilities within the public ROW, an alternative pay arrangement may be negotiated.
    - Improve Coverage Areas: In order to improve network connectivity in underserved areas of a community, an alternative pay arrangement may be negotiated.
    - Negotiable Services: Services in lieu of payment are intended to identify and allow a mutually beneficial arrangement outside of a direct cash payment by the licensee.

- This tier is not intended to allow for a higher negotiated payment amount than those listed above.

Billing:

Pursuant to an issued license, a(n) _____ invoice will be sent to the licensee with payment totals and due dates based upon approved sites.

Performance Bonds:

Subject to the terms of an issued license, a performance bond of not less than $10,000 is to be utilized. A posted METRO Act bond which includes the facilities authorized under an issued license may be deemed an acceptable fulfillment of this requirement in the City/Village/Township's reasonable discretion.

Administrative Fee:

The administrative fee of $500 shall be due and payable prior to the issuance of a license and/or a subsequent amendment to that license.

EXHIBIT B

DAS/SMALL CELL WIRELESS LICENSE AGREEMENT

(Attached)

EXHIBIT C
TIERED MAP
(Attached)

DAS/SMALL CELL LICENSE AGREEMENT

BETWEEN

THE CITY/VILLAGE/TOWNSHIP OF _____

AND _____

THIS DAS/SMALL CELL LICENSE AGREEMENT ("AGREEMENT") DATED AS OF THIS ___ DAY OF _____, 201__, IS ENTERED INTO BY AND BETWEEN THE CITY/VILLAGE/TOWNSHIP OF _____, A MUNICIPAL CORPORATION ("CITY/VILLAGE/TOWNSHIP"), AND _____, A _____ ("LICENSEE").

WHEREAS, the City/Village/Township has made significant investments of time and resources in the acquisition and maintenance of the Public Ways and such investment has enhanced the utility and value of the Public Ways; and

WHEREAS, the Public Ways within the City/Village/Township are used by and useful to private enterprises including LICENSEE and others engaged in providing telecommunications and wireless services to citizens, institutions, and businesses located in the City/Village/Township; and

WHEREAS, the right to access and/or occupy portions of such Public Ways for limited times, for the business of providing communications services, is a valuable economic privilege, the economic benefit of which should be shared with taxpayers; and

WHEREAS, beneficial competition between providers of communications services can be furthered by the City/Village/Township's provision of grants of location and rights to use the Public Ways on non-discriminatory and competitively neutral terms and conditions; and

WHEREAS, LICENSEE is a private enterprise engaged in installing facilities related to and/or providing various communications services within the City/Village/Township by means of fiber connected Distributed Antenna Systems or other Small Cell facilities (DAS/Small Cells or DAS/Small Cell Networks); and

WHEREAS, LICENSEE desires to physically occupy portions of the Public Way to install poles, antennas or equipment, to utilize City/Village/Township owned light, traffic signal or other City/Village/Township owned poles, and/or to utilize third party poles for use of its DAS/Small Cells; and

WHEREAS, LICENSEE's private enterprise will be aided if allowed to exercise a valuable benefit by using the Public Ways in a manner not enjoyed by the general public; and

WHEREAS, LICENSEE is agreeing to compensate the City/Village/Township for installation and/or operation of all antennas, supporting structures for antennas, equipment shelters, poles or houses associated with its DAS/Small Cells in exchange for a grant of location

and the right to use and physically occupy portions of the Public Ways for the limited purposes and periods set forth below; and

WHEREAS, to the extent required by Law, LICENSEE has or will contemporaneously with this Agreement seek and obtain a Metro Act Permit for the transmission or cable line portion of its DAS/Small Cells pursuant to 2002 PA 48; MCL 484.3101 et seq.; and

WHEREAS, the City/Village/Township grants this license pursuant to its authority to manage its public spaces including, without limitation, authority under the Michigan Constitution of 1963.

NOW THEREFORE BE IT RESOLVED, in consideration of the terms and conditions contained in this Agreement, the City/Village/Township and LICENSEE do hereby agree:

1.0 DEFINITIONS

Except as otherwise defined herein, the following terms shall have the meanings given below:

1.1 "Agency" means any governmental agency or quasi-governmental agency other than City/Village/Township, including, but not limited to, the Federal Communications Commission (FCC) and the Michigan Public Service Commission, Metro Authority or Local Community Stabilization Authority.

1.2 "Business Day" means any Day other than a Saturday, Sunday, or Day observed as an official holiday by the City/Village/Township.

1.3 "DAS/Small Cells" or "DAS/Small Cell Network" means any and all telecommunication facilities or related equipment installed and/or operated by LICENSEE for the provision of telecommunication or wireless services including the fiber optic or other cables, antennas, brackets, devices, conduits, poles, support structures, shelters, houses, cabinets and all other related equipment to be deployed, installed and/or operated by LICENSEE as described in Exhibit A attached hereto and any similar facilities that replace the same as permitted consistent with the terms of this Agreement.

1.4 "Day" or "day" means any calendar day, unless a Business Day is specified. For the purposes hereof, if the time in which an act is to be performed falls on a Day other than a Business Day, the time for performance shall be extended to the following Business Day. For the purposes hereof, the time in which an act is to be performed shall be computed by excluding the first Day and including the last.

1.5 "FCC" means the Federal Communications Commission.

1.6 "Grant" when used with reference to grant or authorization of the City/Village/Township, means the prior written authorization of the City/Village/Township of _____ (and/or its various boards and commissions) unless another person or method for authorization is specified herein or under applicable law. Grant does not mean "Approval" as contemplated in various FCC determinations

related to subsequent co-location requests which are expressly not granted by this Agreement.

1.7 Intentionally Omitted.

1.8 "Law" or "Laws" means any federal, state or local statute, ordinance, resolution, regulation, rule, tariff, administrative order, certificate, order, or other lawful requirement in effect either at the time of execution of this Agreement or at any time during the period the DAS/Small Cells are located in the Public Rights-of-Ways.

1.9 "Person" or "person" means an individual, a corporation, a partnership, a sole proprietorship, a joint venture, a business trust, or any other form of business association or government agency.

1.10 "Pole" or "pole" means light poles, wooden power poles, traffic light poles, highway sign poles, utility poles, lighting fixtures or other similar poles or structures located in the Public Way under the jurisdiction of the City/Village/Township or LICENSEE or other third parties or following transfer from the City/Village/Township or other third parties and may refer to such facilities in the singular or plural, as appropriate to the context in which used. The term poles excludes any historically or architecturally significant poles owned by the City/Village/Township located on Public Ways or, other similar street features.

1.11 "Public Ways" or "Public Rights-of-Way" means the areas in, upon, above, along, across, under, and over the public streets, sidewalks, roads, lanes, courts, ways, alleys, rights-of-way, boulevards, buildings and any other public places owned or controlled by and within the City/Village/Township as the same now or may hereafter exist and which are under the permitting jurisdiction of the City/Village/Township.

1.12 Intentionally Omitted.

1.13 "Services" means those services provided by or through LICENSEE's DAS/Small Cells as set forth herein. If the City/Village/Township grants the provision of any other services by LICENSEE, upon such grant, the definition of "Services" shall automatically be revised to include any such grant of additional services. Unless specifically expressed in this Agreement, Services does not mean video service of any kind.

2.0 TERM OF AGREEMENT

The term of this Agreement shall commence on the date of execution by the City/Village/Township ("Commencement Date") and shall end on _____. It is intended that this Agreement be coterminous with the Metro Act Permit issued relative to this same project.

Upon written application to City/Village/Township delivered no later than one hundred and eighty (180) days before the end date of the term of this Agreement, the LICENSEE may request to amend this Agreement to extend the end date to a proposed new date. Assuming the LICENSEE has met all conditions of the Agreement and

performed to City/Village/Township's reasonable satisfaction in providing the Services in the City/Village/Township, and assuming that City/Village/Township believes extension of the term of this Agreement would be in the public interest, the term end date of this Agreement may be extended subject to whatever modifications of other Agreement terms and conditions the City/Village/Township may find are appropriate and in parallel with any termination and/or extension of any related Metro Act Permit(s).

3.0 DESCRIPTION OF WORK

3.1 Installation of DAS/SMALL CELL NETWORKS. During the term of this Agreement, LICENSEE is authorized, on a non-exclusive basis, to locate and install Poles and antennae, or to attach to Poles owned by the City/Village/Township or Poles owned by third parties, to house and operate a DAS/Small Cell Network in the Public Ways or other City/Village/Township owned or controlled property, all as more particularly identified in Exhibit A and as supplemented in a manner consistent with this Agreement. This Agreement does not give rights to use any poles owned by third parties.

3.1.1. Location of DAS/Small Cell Networks. The City/Village/Township may grant or deny the location and installation of any DAS/Small Cell Network on a pole prior to installation, based on reasonable regulatory factors, such as the location of other present or future communications facilities, efficient use of scarce physical space to avoid premature exhaustion, potential interference with other communications facilities and services, the public safety and other critical public services; provided, however, that such grant shall not be unreasonably conditioned, withheld, or delayed. After this Agreement is initally approved by the City/Village/Township, the LICENSEE may request, and the City/Village/Township may administratively grant, the right to locate and install additional facilities of the DAS/Small Cell Networks in the Public Ways, subject to the supplementation of Exhibit A as reasonably necessary to identify the location of the same and the LICENSEE's agrement to comply with the terms of this Agreement as to any such new facilities.

3.1.2 Map and List of DAS/Small Cell Network. LICENSEE shall maintain in a form acceptable to the City/Village/Township, a current map and list of the location of all facilities used by LICENSEE for its DAS/Small Cell Network pursuant to this Agreement and located in Public Ways. LICENSEE shall provide the City/Village/Township with a current map and list, as supplemented from time to time. LICENSEE shall obtain all required permits and grants of the City/Village/Township and any of its departments or agencies, and any other Agency with jurisdiction over the DAS/Small Cells, services or the property on which the DAS/Small Cells are or will be located, prior to performing any work under this Agreement and shall comply with all of the terms and conditions set forth in these permits. LICENSEE shall not mount, construct, install, maintain, locate, operate, place, protect, reconstruct, reinstall, remove, repair, or replace any DAS/Small Cells on any pole, except as expressly authorized by and in strict compliance with this Agreement, and shall not without further and separate authorization, otherwise locate more than one antenna or other related structure on

any single pole.

3.1.3 Changes to DAS/Small Cell Networks or Their Location on Poles Located on Public Ways. If LICENSEE proposes to install different but comparable equipment, or if the DAS/Small Cell or its location on the poles located on Public Ways deviate in any material way from the specifications previously approved by the City/Village/Township, then LICENSEE shall first obtain a grant for the use and installation of the comparable equipment or for any such deviation in the DAS/Small Cells Network from the owners of the poles located on Public Rights-of-Way and shall provide the City/Village/Township with written evidence of such authorization. Modifications shall not be subject to this grant requirement to the extent that (i) such modification to the attachment involves only substitution of internal components, and does not result in any change to the external appearance, dimensions or weight of the attachment, as approved by the City/Village/Township; or (ii) such modification involves replacement of the attachment that is the same, or smaller in weight and dimensions than the approved attachment. LICENSEE will notify the City/Village/Township of any such modification within 15 days after modification is made. The City/Village/Township may not unreasonably deny use of the different but comparable equipment, or non-material deviation from the specifications previously approved by the City/Village/Township with regard to the placement of the DAS/Small Cell equipment on the poles located on Public Ways, pursuant to the factors enumerated under Section 3.1.1, and such grant shall not be unreasonably conditioned, withheld, or delayed.

3.2 Provision of Services. The DAS/Small Cell Network installed pursuant to this Agreement may be used solely for the rendering of telecommunication services. If LICENSEE proposes to make a material change to the nature or character of the services not expressly permitted under this Agreement, including, without limitation, video programming services, open video system services, or cable television services, LICENSEE shall notify the City/Village/Township in writing of this intended change not less than one hundred and eighty (180) days prior to the proposed date of change to Service. The City/Village/Township may either (i) accept the proposed change in Service on mutually agreeable terms and conditions or (ii) require that the Services not be changed but rather continue to be provided as contemplated herein.

3.3 Restoration of Work Site Areas. Upon the completion of each task or phase of work to be performed by LICENSEE under this Agreement, LICENSEE shall promptly restore all work site areas to a condition reasonably satisfactory to the City/Village/Township and in accordance with construction standards as specified by the City/Village/Township, ordinary wear and tear not caused by LICENSEE or the DAS/Small Cells Networks excepted. The City/Village/Township may, in its discretion, obtain reimbursement for the above by making a claim under LICENSEE's performance bond. The provisions of this section shall survive the expiration, completion or earlier termination of this Agreement.

3.4 Removal of DAS/Small Cell Network upon Expiration or Termination of Agreement. Upon one hundred and eighty (180) days' written notice by the City/Village/Township pursuant to the expiration or earlier termination of this Agreement for cause, LICENSEE shall promptly, safely and carefully remove the DAS/Small Cell Network from and including all poles and other places located in Public Ways. Such obligation of LICENSEE shall survive the expiration or earlier termination of this Agreement. If LICENSEE fails to complete this removal work on or before the one hundred and eighty (180) days subsequent to the issuance of notice pursuant to this Section 3.4, then the City/Village/Township, upon written notice to LICENSEE, shall have the right at the City/Village/Township's sole election, but not the obligation, to perform this removal work and charge LICENSEE for the reasonable and actual costs and expenses, including, without limitation, reasonable administrative costs. LICENSEE shall pay to the City/Village/Township the reasonable and actual costs and expenses incurred by the City/Village/Township in performing any removal work and any storage of LICENSEE's property after removal (including any portion of the DAS/Small Cell Networks) within thirty (30) days of the date of a written demand for this payment from the City/Village/Township. The City/Village/Township may, in its discretion, obtain reimbursement for the above by making a claim under LICENSEE's performance bond. After the City/Village/Township receives the reimbursement payment from LICENSEE for the removal work performed by the City/Village/Township, the City/Village/Township shall promptly return to LICENSEE the property belonging to LICENSEE and removed by the City/Village/Township pursuant to this Section 3.4 at no liability to the City/Village/Township. If the City/Village/Township does not receive the reimbursement payment from LICENSEE within such thirty (30) days, or if City/Village/Township does not elect to remove such items at the City/Village/Township's cost after LICENSEE's failure to so remove prior to one hundred and eighty (180) days subsequent to the issuance of notice pursuant to this Section 3.4, any items of LICENSEE's property, including without limitation the DAS/Small Cell Networks, remaining on or about the Public Ways or stored by the City/Village/Township after the City/Village/Township's removal thereof may, at the City/Village/Township's option, be deemed abandoned and the City/Village/Township may dispose of such property in any manner allowed by Law, and in accordance with any legal rights of persons other than the City/Village/Township who own poles located in the Public Way and used by LICENSEE. Alternatively, the City/Village/Township may elect to take title to such abandoned property, whether the City/Village/Township is provided by the LICENSEE, an instrument satisfactory to the City/Village/Township transferring to the City/Village/Township the ownership of such property, or not. The provisions of this section shall survive the expiration or earlier termination of this Agreement.

3.5 Risk of Loss or Damage. LICENSEE acknowledges and agrees that LICENSEE bears all risk of loss or damage of its equipment and materials, including, without limitation, the DAS/Small Cell Networks, installed in the Public Rights-of-Way pursuant to this Agreement from any cause, and the City/Village/Township shall not be liable for any cost of repair to damaged DAS/Small Cell Networks, including, without limitation, damage caused by the City/Village/Township's removal of DAS/Small Cell Networks, except to the extent that such loss or damage was caused by the sole negligence

or willful misconduct of the City/Village/Township, including without limitation, each of its commissions, boards, departments, officers, agents, employees or contractors.

3.6 Removal or Relocation of DAS/Small Cell Network at City/Village/Township's Request. LICENSEE understands and acknowledges that the City/Village/Township, at any time and from time to time, may require LICENSEE to remove or relocate upon a written request from the City/Village/Township on one hundred and eighty (180) days notice at LICENSEE's sole cost and expense, portions of the DAS/Small Cell Network whenever City/Village/Township reasonably determines that the removal or relocation is needed: (l) to facilitate or accommodate the construction, completion, repair, relocation, or maintenance of a City/Village/Township project, (2) because the DAS/Small Cell Network interferes with or adversely affects proper operation of the light poles, traffic signals, City/Village/Township-owned communications systems or other City/Village/Township facilities, (3) because of a sale or vacation of the Public Ways by the City/Village/Township, (4) because there is a change in use of the Public Ways by the City/Village/Township provided such use similarly effects similarly LICENSED users in the public right of way, (5) because there is damage to and/or removal of the pole, or (6) to preserve and protect the public health and safety, in a manner not inconsistent with 47 U.S.C. § 332(c)(7). LICENSEE shall at its own cost and expense remove, relocate and/or adjust the DAS/Small Cell Network, or any part thereof, to such other location or locations in the Public Rights-of-Way, or in such manner, as appropriate, as may be designated or granted, in writing and in advance, by the City/Village/Township. Such removal, relocation, adjustment shall be completed within the time prescribed by the City/Village/Township in its written request, which time prescribed shall, at a minimum, be one hundred and eighty (180) days after the City/Village/Township provides its written request, and in accordance with the terms of this Agreement. LICENSEE shall not be in default hereunder if it has taken appropriate action as directed by the City/Village/Township to obtain such grant. If LICENSEE fails to remove, relocate, adjust or support any portion of the DAS/Small Cell Network as described by the City/Village/Township within the prescribed time, City/Village/Township may take all reasonable, necessary, and appropriate action, as stated in Section 3.4.

4.0 PERMIT, LIMITATIONS AND RESTRICTIONS

4.1 Limited Authorization. This Agreement does not authorize the placement of DAS/Small Cell Networks or any other equipment on sites, locations, structures or facilities other than those specifically identified or provided for herein. Placement of the DAS/Small Cell Networks shall comply with the terms of the City/Village/Township's conditions of access in effect as of the date of execution hereof and as are applied equally to all similarly situated Persons using the Public Rights-of-Way under grant by the City/Village/Township. The Agreement does not relieve LICENSEE of its burden of seeking any necessary permission from other Agencies which may have jurisdiction regarding LICENSEE's proposed use.

4.2 Intentionally Omitted.

4.3 Reservation of Powers. The City/Village/Township reserves any and all powers it may have, now or in the future under applicable Laws, to regulate the DAS/Small Cell Networks, their use, or the use of the Public Rights-of-Way or of other City/Village/Township property. LICENSEE shall be subject to all present and future ordinances of the City/Village/Township and its boards and commissions. Nothing in this Agreement shall be construed as a waiver of any codes, ordinances or regulations of the City/Village/Township or of the City/Village/Township's right to require LICENSEE to secure the appropriate permits, approvals or authorizations for exercising the rights set forth in this Agreement.

4.4 All Permitted Activities Fees at LICENSEE'S Sole Expense. Notwithstanding any other provision of this Agreement, the construction, operation, maintenance, removal and replacement of DAS/Small Cell Networks, and all other activities permitted hereunder and all fees or obligations of LICENSEE under this Agreement, shall be LICENSEE's sole responsibility at LICENSEE's sole cost and expense.

4.5 Permit. LICENSEE shall obtain, at its sole expense, any applicable permits as are required by City/Village/Township or any other Agency to perform the work and ongoing use, as described in this Agreement, in the Public Rights-of-Way, including but not limited to a Metro Act Permit pursuant to 2002 PA 48; MCL 484.3101et seq.

4.6 No Real Property Interest Created. Neither LICENSEE's use of the Public Rights-of-Way, nor anything contained in this Agreement, shall be deemed to grant, convey, create, or vest in LICENSEE a real property interest in any portion of the Public Rights-of-Way or any other City/Village/Township property, including but not limited to, any fee or leasehold interest in any land or easement. LICENSEE, on behalf of itself and any permitted successor or assign, recognizes and understands that this Agreement may create an interest subject to taxation and that LICENSEE, its successor or assign shall be subject to and responsible for the payment of such taxes.

4.7 All Rights Nonexclusive. Notwithstanding any other provision of this Agreement, any and all rights expressly or impliedly granted to LICENSEE under this Agreement shall be non-exclusive, and shall be subject and subordinate to (1) the continuing right of the City/Village/Township to use, and to allow any other Person or Persons to use, any and all parts of the Public Rights-of-Way, exclusively or concurrently with any other Person or Persons and (2) the public easement for streets and public utilities and any and all other deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title (collectively, "Encumbrances") which may affect the Public Rights-of-Way now or at any time during the term of this Agreement, including without limitation any Encumbrances granted, created or allowed by the City/Village/Township at any time.

4.8 Co-Location. This Agreement does not grant or approve any co-location rights to any person or entity, related or unrelated to the LICENSEE. LICENSEE is authorized to install one main antenna per site. LICENSEE's ancillary antennas will be permitted as long as they conform to the specifications in Exhibit A and are otherwise

authorized by the City/Village/Township. Additional principal antennas require new and additional licensure at the City/Village/Township's discretion in accordance with and subject to this Agreement. In the event the City/Village/Township grants a co-location or similar right of way use request to a third party, LICENSEE shall make such accommodations necessary in its commercially reasonable discretion and consistent with the Law to allow such co-location or pole attachment on any pole or other support structure referenced in this Agreement.

5.0 WAIVERS AND INDEMNIFICATION

5.1 Non-Liability of City/Village/Township Officials, Employees and Agents. No elective or appointive board, commission, member, officer, employee or other agent of the City/Village/Township shall be personally liable to LICENSEE, its successors and assigns, in the event of any default or breach by the City/Village/Township or for any amount which may become due to LICENSEE, its successors and assigns, or for any obligation of City/Village/Township under this Agreement.

5.2 Obligation to Indemnify the City/Village/Township. LICENSEE, its successors and assigns, shall hold harmless, defend, protect and indemnify the City/Village/Township, including, without limitation, each of its commissions, departments, officers, agents, employees and contractors, from and against any and all actions, losses, liabilities, expenses, claims, demands, injuries, damages, fines, penalties, costs, judgments or suits including, without limitation, reasonable attorneys' fees and costs (collectively, "Claims" or "Claim") of any kind, including, but not limited to, personal or bodily injury, death and property damage, made upon the City/Village/Township arising out of a third-party claim, directly or indirectly, involving any acts or omissions of LICENSEE or its contractors or subcontractors, or the officers, agents, or employees of any of them, while in the exercise of the rights or performance of the duties under this Agreement or otherwise, except to the extent that any such Claims result from the sole negligence or willful misconduct of the City/Village/Township, including, without limitation, each of its commissions, boards, departments, officers, agents, employees or contractors.

5.3 Scope of Indemnity. LICENSEE shall hold harmless, indemnify and defend the City/Village/Township as required herein, including without limitation, each of its commissions, boards, departments, officers, agents, employees and contractors, except only for Claims resulting from the sole negligence or willful misconduct of the City/Village/Township, including without limitation, each of its commissions, boards, departments, officers, agents, employees and contractors. LICENSEE specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City/Village/Township from any Claim which actually or potentially falls within this indemnity provision. The City/Village/Township shall give prompt written notice to LICENSEE of any claim for which the City/Village/Township seeks indemnification.

5.4 Intentionally Omitted.

5.5 Waiver of All Claims. LICENSEE acknowledges that this Agreement is terminable by the City/Village/Township under limited circumstances as provided herein,

and in view of such fact LICENSEE expressly assumes the risk of making any expenditures in connection with this Agreement, even if such expenditures are substantial, and LICENSEE expressly assumes the risk of selling its Services which may be affected by the termination of this Agreement. Without limiting any indemnification obligations of LICENSEE or other waivers contained in this Agreement and as a material part of the consideration for this Agreement, LICENSEE fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against, and covenants not to sue, City/Village/Township, its departments, commissions, officers, boards, Commissioners and employees, and all persons acting by, through or under each of them, under any present or future Laws, including, but not limited to, any claim for inverse condemnation or the payment of just compensation under the law of eminent domain, or otherwise at equity, in the event that the City/Village/Township exercises its right to terminate this Agreement, as specifically provided herein.

5.6 No Liability for Consequential, Indirect, Punitive or Incidental Damages. Neither LICENSEE nor the City/Village/Township will be liable for any consequential, indirect, punitive or incidental damages, including, but not limited to, lost profits and loss of good will. Neither LICENSEE nor City/Village/Township would be willing to enter into this Agreement in the absence of a waiver of liability for consequential, indirect, punitive or incidental damages. Accordingly, without limiting any indemnification obligations or other waivers contained in this Agreement and as a material part of the consideration for this Agreement, (a) LICENSEE fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action for consequential, indirect, punitive and incidental damages (including without limitation, lost profits and loss of good will), and covenants not to sue for such damages, City/Village/Township, its departments, boards, commissions, officers, agents and employees, and all persons acting by, through or under each of them and (b) City/Village/Township fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action for consequential, indirect, punitive and incidental damages (including without limitation, lost profits and loss of good will), and covenants not to sue for such damages, LICENSEE, its officers, agents and employees, and all persons acting by, through or under each of them.

5.7 No Interference. LICENSEE shall not unreasonably interfere in any manner with the existence and operation of any and all public and private facilities existing now or in the future in the Public Ways including, but not limited to, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electric and telephone wires, electroliers, cable television, telecommunications facilities, utility, and municipal property without the express grant of the owner or owners of the affected property or properties, except as permitted by applicable Laws or this Agreement. LICENSEE shall be responsible for repair and restoration of any damage caused by such interference, to the extent it is caused by LICENSEE, to facilities belonging to the City/Village/Township. The City/Village/Township agrees to require the inclusion of the same prohibition on interference as that stated above in all similar type agreements City/Village/Township may enter into after the date hereof.

5.8 Survival of Termination. The provisions of Sections 5.1 through 5.7, inclusive, shall survive any termination of this Agreement.

6.0 INSURANCE

6.1 Amounts and Coverages. LICENSEE will maintain in force, during the full term of this Agreement, insurance in the following amounts and coverages:

6.1.1 Workers' Compensation, with Employer's Liability limits of not less than One million dollars ($1,000,000) each accident.

6.1.2 Commercial General Liability Insurance with limits not less than five million dollars ($5,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Owners and Contractors' Protective, Broadform Property Damage, Products Completed Operations.

6.1.3 Business Automobile Liability Insurance with limits not less than one million dollars ($1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including owned, non-owned and hired auto coverage, as applicable.

6.2 Required Provisions. General Liability and Automobile Liability Insurance shall be endorsed to provide for the following:

6.2.1 Name as additional insureds: the City/Village/Township, its officers, agents and employees.

6.2.2 That such policies are primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

6.3 Advance Notice of Cancellation. All policies shall be endorsed to provide: thirty (30) days advance written notice to City/Village/Township of cancellation or intended non-renewal, mailed to the following address:

_____
_____
_____
_____

6.4 Intentionally Omitted.

6.5 General Aggregate Limit. Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate

limit, such general aggregate limit shall double the occurrence or claims limits specified above.

6.6 Receipt of Certificates of Insurance. Certificates of insurance, in the form and with insurers reasonably satisfactory to the City/Village/Township, evidencing all coverages above shall be furnished to the City/Village/Township before commencing any operations under this Agreement, with complete copies of policies promptly upon the City/Village/Township's written request.

6.7 Effect of Approval of Insurance. Approval of the insurance by the City/Village/Township shall not relieve or decrease the liability of LICENSEE hereunder.

6.8 Effect of Lapse of Insurance. This Agreement shall terminate immediately, after written notice to LICENSEE and an opportunity to cure of sixty (60) days, upon any lapse of required insurance coverage.

7.0 LICENSE FEE, RECORD and DEPOSITS

In connection with the work to be performed and activities to be conducted by LICENSEE under this Agreement:

7.1 Right-of-Way Fees for Installation and operation of DAS/Small Cell related Metro Act exempt facilities including antennas, supporting structures for antennas, poles equipment shelters or houses . In order to compensate the City/Village/Township for LICENSEE's utilization and deployment of DAS/Small Cell related Metro Act exempt facilities including antennas, supporting structures for antennas, poles, equipment shelters or houses within the Public Rights-of-Way, LICENSEE shall pay to the City/Village/Township of the following :

Administrative Fee. Within 30 days of the City/Village/Township's approval of this Agreement, a one-time administrative fee, in addition to the regular monthly fee referenced below, of $_____. These funds can be used for City/Village/Township incurred costs as needed.

Monthly Fee. As compensation for the installation and use of any and all antennas or structures in the City/Village/Township Public Ways including but not limited to poles or other structures and facilities, in whole or in part, whether held in fee or in trust by the City/Village/Township ("City/Village/Township Facility"), by LICENSEE or a third party, LICENSEE shall pay to the City/Village/Township a monthly fee (the "Monthly Fee") in the amount identified in the schedule set forth immediately below, per site for the use of each such facility or structure, whether owned by the City/Village/Township, the LICENSEE or a third party, which location is located in the City/Village/Township Public Ways and upon which a DAS/Small Cell Network antenna, or any supporting structure thereof, has been installed pursuant to the other requirements of this Agreement. The aggregate Monthly Fee shall be an amount equal to the number of LICENSEE's sites within the City/Village/Township's Public Ways or other property locations or equipment or Poles on which LICENSEE's equipment was currently existing during the preceding month, multiplied by the Monthly Fee, prorated as appropriate. Payments by the

LICENSEE shall be due and payable to the City/Village/Township within 30 Days of invoicing by the City/Village/Township. At the discretion of the City/Village/Township, invoices may be sent monthly, quarterly or annually.

The parties to this Agreement do not intend, and this Agreement does not grant, the utilization of any jointly owned or third party owned properties.
This Agreement anticipates AND AUTHORIZES ONLY ONE ANTENNA PER POLE OR STRUCTURE AND every antenna as well as every antennae/related support structure, installed by LICENSEE in City/Village/Township Public Ways shall be subject to a monthly fee as identified in this section:

Schedule of Monthly Fees per Site (not more than one antennae/pole):

Tier 1:

- $25.00 Per Month Per Pole
- Applicability: poles or facilities in a rural or low traffic areas and/or without existing infrastructure
- Zoning Areas or Sections: Community Specific
- This tier would include all existing DAS/Small Cell Wireless poles installed without a license prior to the date of this Agreement
- Sample Metrics: County road, no existing infrastructure

Tier 2:

- $75.00 Per Month Per Pole
- Applicability: poles or facilities in a residential or medium traffic area with moderate infrastructure
- Zoning Areas or Sections: Community Specific
- Sample Metrics: Local street classification; existing overhead infrastructure

Tier 3:

- $150.00 Per Month Per Pole
- Applicability: poles or facilities in a Commercial/Industrial area or corridor. Medium to heavy traffic areas and more dense infrastructure.
- Zoning Areas or Sections: Community Specific
- Sample Metrics: Major street classification; existing underground/overhead infrastructure

Alternative Monthly License Fee Schedule:

Tier 4:

- Colocations: In an effort to support co-locations and reduce the number of poles and facilities within the Public Ways, an alternative pay arrangement may be negotiated
- Improve Coverage Areas: In order to improve network connectivity in underserved areas of a community, an alternative pay arrangement may be negotiated

- Negotiable Services: Services in lieu of payment are intended to identify and allow a mutually beneficial arrangement outside of a cash payment by the LICENSEE
- This tier is not intended to allow for a higher negotiated payment amount than those set forth above

(It is the intent of the parties that all antennas are to be placed on poles only, as described above.)

A map reflecting the tiered areas and Public Ways is attached as Exhibit C and incorporated by reference. Exhibit C may be amended by the City/Village/Township following thirty (30) Days prior notice to the LICENSEE.

7.2 Retention of Records. LICENSEE shall at all times keep and maintain full, true and correct business and financial records associated with this Agreement and, upon the City/Village/Township's reasonable request, provide such records on a quarterly basis in such form as to support the payments made under Section 7.1 above.

7.3 Late Payment Charge. If LICENSEE fails to pay any amounts payable under this Agreement within thirty (30) days after due, such unpaid amount shall be subject to a late payment charge equal to ten percent (10%) of the unpaid amount in each instance. The late payment charge has been agreed upon by the City/Village/Township and LICENSEE, after negotiation, as a reasonable estimate of the additional administrative costs and detriment that the City/Village/Township will incur because of any such failure by LICENSEE, the actual costs thereof being extremely difficult if not impossible to determine.

7.4 Other Payments and Documentation. In addition to all other fees to be paid to the City/Village/Township hereunder, LICENSEE shall timely pay to the City/Village/Township all applicable deposit fees, permit fees, zoning fees, engineering fees and other fees or amounts, required to be paid by LICENSEE to the City/Village/Township in connection with obtaining permits or performing work under this Agreement, and as required by any federal, state or local law, statute, ordinance, rule or regulation. LICENSEE therefore acknowledges and agrees that this Agreement alone is not necessarily sufficient in and of itself authorization from the City/Village/Township for the installation and operation of the DAS/Small Cell Networks and that additional documentation may be required by the City/Village/Township.

7.5 Security Deposit/Bond. Prior to performing any work necessary under this Agreement, and with respect to all such work, LICENSEE will deliver to the City/Village/Township a valid performance bond in the sum of Ten Thousand dollars ($10,000), issued by a surety company acceptable to the City/Village/Township's Controller in the form attached hereto as Exhibit B. Alternatively, where a performance bond has been posted by the LICENSEE with the City/Village/Township pursuant to the METRO Act, and where such bond is extended to encompass the DAS/Small Cell Network permitted by this Agreement, the City/Village/Township may accept the METRO Act bond in lieu of the necessity of LICENSEE posting a separate bond pursuant to this Section 7.5.

LICENSEE agrees and acknowledges that it will obtain a bond which allows for the use of the bond to cover incidental expenses and costs, removal expenses, restoration expenses, damages and fees not covered by any insurance policies including but not limited to: interest, charges by the City/Village/Township to remove DAS/Small Cell Networks and unpaid permit and administrative fees. LICENSEE shall keep such surety bond, at its expense, in full force and effect until the sixtieth (60th) day after the expiration or other termination hereof, to insure the faithful performance by LICENSEE of all of the covenants, terms and conditions of this Agreement. Such bond shall provide thirty (30) days prior written notice to the City/Village/Township of cancellation or material change thereof. In the event of any non-extension of the bond, LICENSEE shall replace such security with another form permitted hereunder at least ten (10) days prior to expiration and if LICENSEE fails to do so the City/Village/Township shall be entitled to present its written demand for payment of the entire face amount of such bond and to hold the funds so obtained as the security deposit required hereunder. Any unused portion of the funds so obtained by the City/Village/Township shall be returned to LICENSEE upon replacement of the bond or deposit of cash security in the full amount required hereunder.

8.0 WORK STANDARDS

8.1 Performance of Work. LICENSEE shall use and exercise due care, caution, skill and expertise in performing all work under this Agreement and shall take all reasonable steps to safeguard and maintain in clean and workmanlike manner, all work site areas, including, without limitation, the light poles located on Public Rights-of-Way and other existing facilities and property. All work to be undertaken by LICENSEE in the Public Ways shall at all times be performed by workers, including its own contractors, in accordance with generally accepted industry practice.

8.2 Work Plan. Prior to performing any work necessary under this Agreement, LICENSEE shall present a map and written proposal describing the work to be performed and the facilities, methods and materials (if any) to be installed ("Work Plan") to the City/Village/Township for review and will not perform any work until it has received City/Village/Township Authorization of the Work Plan. The City/Village/Township shall process the Work Plan within thirty (30) days of receipt. In addition, prior to conducting any work in the Public Rights-of-Way, LICENSEE shall provide to the City/Village/Township a current emergency response plan identifying staff who have authority to resolve, twenty-four (24) hours a day, seven (7) days a week, problems or complaints resulting, directly or indirectly, from the DAS/Small Cell Network installed pursuant to this Agreement. As soon as is reasonably practical following installation of the DAS/Small Cell Network, LICENSEE shall deliver as-built drawings to City/Village/Township.

8.3 No Underground Work Without Written Authorization. LICENSEE hereby represents, warrants and covenants that LICENSEE shall perform no excavation, trenching, coring, boring, or digging into the ground or installation of any equipment or other material into the ground, or any other underground work in connection with the work to be performed or Services to be provided by LICENSEE under this Agreement, except to the extent expressly approved by the City/Village/Township. LICENSEE further

represents, warrants and covenants that it shall not otherwise disturb or disrupt the operation or maintenance of any sanitary sewers, storm drains, gas or water mains, or other underground conduits, cables, mains, or facilities.

8.4 Repair or Replacement of Damaged Facilities or Property. Upon written request, LICENSEE agrees to repair or replace to City/Village/Township's reasonable satisfaction any City/Village/Township-owned facilities or City/Village/Township-owned property that the City/Village/Township determines has been damaged, destroyed, defaced or otherwise injured as a result of the work performed or Services provided by LICENSEE under this Agreement. LICENSEE shall perform such work at no expense to the City/Village/Township, except to the extent such damage, destruction, defacement, or injury was caused by the sole negligence or willful misconduct of City/Village/Township.

8.5 Modification of Work Plans. If during the term of this Agreement, the City/Village/Township determines that the public health or safety requires a modification of or a departure from the Work Plan submitted by LICENSEE and granted, the City/Village/Township shall have the authority to identify, specify and delineate the modification or departure required, and LICENSEE shall perform the work allowed under this Agreement in accordance with the City/Village/Township-specified modification or departure at LICENSEE's sole expense. The City/Village/Township shall provide LICENSEE with a written description of the required modification or departure, the public health or safety issue necessitating the modification or departure, and the time within which LICENSEE shall make, complete or maintain the modification or departure required, which time shall, at a minimum, be one hundred eighty (180) days after the City/Village/Township provides its written description to LICENSEE.

9.0 TERMINATION

9.1 Immediate Termination upon Notice in Certain Circumstances. In addition to all other remedies provided by Law or in equity, either party may terminate this Agreement upon written notice to the other party subject to the following:

9.1.1 By the City/Village/Township after 90 days prior written notice to LICENSEE and after opportunity to meet with representatives of the City/Village/Township, if the City/Village/Township reasonably determines that LICENSEE's continued use of the Public Ways will adversely affect public health or safety in a demonstrable manner;

9.1.2 If the other party (the "Defaulting Party") has failed to perform any of its material obligations under this Agreement; provided that, the non-defaulting party (the "Non-Defaulting Party") shall provide the Defaulting Party with a notice of the Defaulting Party's failure to perform or comply and provide the Defaulting Party with sixty (60) days from the date of the notice to cure the failure to perform or comply to the Non-Defaulting Party's reasonable satisfaction.

9.2 Effect of Termination. In the event of termination of this Agreement as herein provided, LICENSEE shall immediately cease all work being performed under this Agreement, excepting only that work necessary for LICENSEE to remove all DAS/Small Cell Networks from the Public Rights-of-Way as provided in Section 3.4 above and repair as needed. Termination of this Agreement by the City/Village/Township as herein provided shall constitute the withdrawal of any grant, consent or authorization of the City/Village/Township for LICENSEE to perform any construction or other work under this Agreement in the Public Ways excepting only that work necessary for LICENSEE to remove all DAS/Small Cell Networks and leave all work site areas in a clean and safe condition. LICENSEE shall remain liable for a prorated portion of the Monthly Fee, if any, up to the time of termination.

10.0 NOTICES

Except as otherwise expressly provided in this Agreement**,** any notice given hereunder shall be effective only if in writing and given by delivering the notice in person, or by sending it first-class mail or certified mail with a return receipt requested, postage prepaid, or reliable commercial overnight courier, return receipt requested, with postage prepaid, to:

CITY/VILLAGE/TOWNSHIP

_____
_____
_____
_____

_____

_____
_____
_____
_____

or to such other address as either CITY/VILLAGE/TOWNSHIP or LICENSEE may designate as its new address for such purpose by notice given to the other in accordance with the provisions of this Section at least ten (10) days prior to the effective date of such change.

11.0 COMPLIANCE WITH LAWS

11.1 LICENSEE shall comply with all present and future Laws.

11.2 All facilities installed pursuant to this Agreement shall be constructed to comply with all lawful federal, state and local construction and applicable telecommunications requirements.

12.0 MISCELLANEOUS

12.1 Amendments. Except as expressly set forth herein, neither this Agreement nor any term or provisions hereof may be changed, waived, discharged or terminated, except by a written instrument signed by the parties hereto.

12.2. Representations and Warranties. Each of the persons executing this Agreement on behalf of LICENSEE does hereby covenant, represent and warrant that, to the best of his or her knowledge, (a) LICENSEE is a duly authorized and existing _____ company, has and is qualified to do business in the _____, and has full right and authority to enter into this Agreement, (b) each and all of the persons signing on behalf of LICENSEE are authorized to do so, and (c) the DAS/Small Cell Networks installed pursuant to this Agreement shall comply with all applicable FCC standards regarding radio frequencies and electromagnetic field emissions. Upon the City/Village/Township's written request, LICENSEE shall provide the City/Village/Township with evidence reasonably satisfactory to the City/Village/Township confirming the foregoing representations and warranties.

12.3 Interpretation of Agreement. This Agreement has been negotiated at arm's length and between persons sophisticated and knowledgeable in the matters dealt with herein and shall be interpreted to achieve the intents and purposes of the parties, without any presumption against the party responsible for drafting any part of this Agreement. Use of the word "including" or similar words shall not be construed to limit any general term, statement or other matter in this Agreement, whether or not language of non-limitation, such as "without limitation" or similar words, are used.

12.4 Assignment; Successors and Assigns.

12.4.1 Neither this Agreement nor any part of LICENSEE's rights hereto may be assigned, pledged or hypothecated, in whole or in part, without the express written consent of the City/Village/Township, which consent shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing, the assignment of the rights and obligations of LICENSEE hereunder to a parent, subsidiary, affiliate, or any person or entity that shall control, be under the control of, or be under common control with LICENSEE, or to any person or entity into which LICENSEE may be merged or consolidated or which purchases all or substantially all of the assets of LICENSEE that are subject to this Agreement shall not be deemed an assignment for the purposes of this Agreement, provided that LICENSEE deliver to the City/Village/Township the following: (1) a performance bond issued in the name of assignee; and (2) Certificate of Insurance naming assignee as insured. Further, without the installation of additional equipment or facilities, LICENSEE may provide capacity across LICENSEE's DAS/Small Cell Network to a third party without the consent required in this Section 12.4.1, so long

as LICENSEE retains control over and remains solely responsible for such DAS/Small Cell Network.

12.4.2 In the event LICENSEE files a petition in bankruptcy pursuant to 11 U.S.C. Sections 101, et seq., the assignment of this Agreement shall be governed by the provisions of the Bankruptcy Code. An assignment of this Agreement is only enforceable against the City/Village/Township if LICENSEE or its trustee in bankruptcy complies with the provisions of 11 U.S.C. Section 365, including obtaining the authorization from the Bankruptcy Court. City/Village/Township hereby expressly reserves all of its defenses to any proposed assignment of this Agreement. Any person or entity to which the Bankruptcy Court authorizes the assignment of this Agreement shall be deemed without further act to have assumed all of the obligations of LICENSEE arising under this Agreement on and after the date of such assignment. Any such assignee shall upon demand execute and deliver to City/Village/Township an instrument confirming such assumption. Any monies or other considerations payable or otherwise to be delivered in connection with such assignment shall be paid to City/Village/Township, shall be the exclusive property of City/Village/Township, and shall not constitute property of LICENSEE or of the estate of LICENSEE within the meaning of the Bankruptcy Code.

12.4.3 Upon the City/Village/Township's request, any assignee under this Section shall execute and deliver to the City/Village/Township an instrument confirming such assumptions.

12.5 Severability. If any provision of this Agreement or the application thereof to any person, entity or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such provision to persons, entities or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each other provision of this Agreement shall be valid and be enforceable to the fullest extent permitted by Law.

12.6 Governing Law. This Agreement shall be construed and enforced in accordance with the Laws of the State of Michigan.

12.7 Entire Agreement. This instrument (including the exhibits hereto, which are made a part of this Agreement) contains the entire agreement between the parties and supersedes all prior written or oral negotiations, discussions, understandings and agreements. The parties further intend that this Agreement shall constitute the complete and exclusive statement of its terms and that no extrinsic evidence whatsoever (including prior drafts of this Agreement and any changes therefrom) may be introduced in any judicial, administrative or other legal proceeding involving this Agreement.

12.8 Time of Essence. Time is of the essence with respect to all provisions of this Agreement in which a definite time for performance is specified.

12.9 Cumulative Remedies. All rights and remedies of either party hereto set forth in this Agreement shall be cumulative, except as may otherwise be provided herein.

12.10 Relationship of Parties. The City/Village/Township is not, and none of the provisions in this Agreement shall be deemed to render the City/Village/Township, a partner in LICENSEE's business, or joint venturer or member in any joint enterprise with LICENSEE. Neither party shall act as the agent of the other party in any respect hereunder, and neither party shall have any authority to commit or bind the other party without such party's prior written consent as provided herein. This Agreement is not intended nor shall it be construed to create any third party beneficiary rights in any third party, unless otherwise expressly provided.

12.11 Recitals. The parties hereby affirm and acknowledge as accurate the Recitals set forth above which may be relied upon in the interpretation of this Agreement.

12.12 Counterparts. This Agreement may be executed in multiple counterparts each of which is an original. Regardless of the number of counterparts, they constitute only one agreement. In making proof of this Agreement, it is not necessary to produce or account for more counterparts than are necessary to show execution by or on behalf of all parties.

CITY/VILLAGE/TOWNSHIP OF
_____, a _____

By:_____
Title:_____
Dated:_____

_____, a
_____

By:_____
Title:_____
Dated:_____

EXHIBITS

Exhibit A DAS/Small Cell Network Plans and Specifications
Exhibit B Bond
Exhibit C Tiered Map/List

EXHIBIT A

DAS/SMALL CELL NETWORK PLANS AND SPECIFICATIONS

EXHIBIT B

SECURITY BOND

Principal:_____
Bond Amount:_____
Bond No.:_____
_____

KNOW ALL MEN BY THESE PRESENTS, THAT WE _____, of_____, as Principal, and _____, as Surety, are held and firmly bound unto the City/Village/Township of _____ or its assigns, in the penal sum of $_____, lawful money, to be paid unto the City/Village/Township for the true payment of which we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has entered into a DAS/Small Cell License Agreement dated _____,
2016 with the City/Village/Township ("Agreement"), which contract is referred to and made a part hereof as if fully set forth; and,

WHEREAS, Section 7.5 of the Agreement requires a Security Deposit to cover incidental expenses and costs, damages and fees not covered by any insurance policies including but not limited to: interest, charges by the City/Village/Township to remove DAS/Small Cell Networks and unpaid permit and administrative fees; and

WHEREAS, the City/Village/Township conditionally granted approval on_____for the DAS/Small Cell Network Plans and Specifications as set forth in the Agreement.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that this obligation shall remain in full force and effect until the sixtieth (60th) day after the Expiration Date of the Agreement or other lawful termination hereof, to insure the faithful performance by Licensee of all of the covenants, terms and conditions of the DAS/Small Cell License Agreement. Thirty (30) days prior written notice to the City/Village/Township is required for bond cancellation or material change thereof.

Whenever Principal shall be declared by the City/Village/Township to be in default under the approved DAS/Small Cell Network Plans and Specifications or Agreement, the Surety shall promptly remedy the default, or make available sufficient funds to pay the costs of the City/Village/Township in remedying the deficiencies in accordance with the terms of the Agreement, but not exceeding the amount set forth in the first paragraph hereof.

(Remainder of page left intentionally blank.)

Signed, sealed, and dated this_____day of_____, 201_.

IN THE PRESENCE OF:

Principal:_____

Signed:_____

Title:_____

Surety:_____

Signed:_____

Title:_____

EXHIBIT C

TIERED MAP AND LIST

CAUSE NO. D-1-GN-17-004766

CITY OF MCALLEN; CITY OF DALLAS; CITY OF PLANO; CITY OF GARLAND; CITY OF IRVING; CITY OF AMARILLO; CITY OF BROWNSVILLE; CITY OF MCKINNEY; CITY OF SUGAR LAND; CITY OF MISSION; CITY OF PHARR; CITY OF COPPELL; CITY OF DUNCANVILLE; CITY OF WESLACO; CITY OF SAN BENITO; CITY OF ALAMO; CITY OF MIDLOTHIAN; CITY OF HIGHLAND VILLAGE; CITY OF SEAGOVILLE; CITY OF ALTON; CITY OF RED OAK; CITY OF BOERNE; CITY OF ROMA; CITY OF ROCKPORT; CITY OF LA FERIA; TOWN OF FAIRVIEW; CITY OF LUCAS; CITY OF BALCONES HEIGHTS; CITY OF SOUTH PADRE ISLAND; CITY OF OLMOS PARK; CITY OF ESCOBARES; TOWN OF WESTLAKE; CITY OF SIMONTON; and JIM DARLING, in both his official capacity as Mayor of the City of McAllen and individual capacity,	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
v.	§	
THE STATE OF TEXAS	§	
Defendant.	§	**TRAVIS COUNTY, TEXAS**
	§	**353rd JUDICIAL DISTRICT**

PLAINTIFFS' FIRST AMENDED PETITION AND APPLICATION FOR INJUNCTIVE RELIEF

I. INTRODUCTION

Since the time of its framing in 1876, the Texas Constitution has jealously guarded and preserved the resources and power of the government. This is demonstrated with unmistakable clarity in the Constitution's prohibitions against gifting public funds or other things of value to aid

the commercial interests of a private enterprise and against the delegation of legislative power to private entities without providing for adequate standards of exercise or oversight.

Notwithstanding these constitutional prohibitions, SB 1004 seeks to require Texas municipalities to forego arm's-length negotiation and instead grant private wireless providers the use of the public right-of-way for a gratuitously-small fraction of the market rate. The legislation also places legislative powers relating to zoning and the management of municipal right-of-way in the hands of private entities without providing guidelines for, or oversight over, the exercise of these essential municipal police powers.

In mandating this result, the Legislature has not only violated the anti-gift and non-delegation provisions of the Texas Constitution, but would make cities and their officials complicit in these transgressions by having them administer and sanction the transfer of wealth of as much as hundreds of millions of dollars from municipal coffers to private telecommunications companies each year and by having them abandon their obligations to the public by relinquishing their responsibilities for implementing effective zoning measures and right-of-way management. Taxpayers in these municipalities have an interest in preventing the unconstitutional transfer of valuable city assets and legislative powers to private corporations. Put to the untenable choice of violating SB 1004 or the state constitution, the named plaintiffs seek a declaration that SB 1004 is unconstitutional and further seek an injunction against its implementation and enforcement because it violates article II, section 1, article III, section 1, article III, section 52, and article XI, section 3, of the Texas Constitution.

II. DISCOVERY CONTROL PLAN

1. Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, Plaintiffs intend that discovery be conducted under Level 3.

III. PARTIES AND SERVICE OF PROCESS

2. Plaintiff City of McAllen is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

3. Plaintiff City of Dallas is a duly incorporated home-rule municipality located in Dallas, Collin, Denton, Kaufman, and Rockwall Counties, Texas.

4. Plaintiff City of Plano is a duly incorporated home-rule municipality located in Collin and Denton Counties, Texas.

5. Plaintiff City of Garland is a duly incorporated home-rule municipality located in Dallas, Collin, and Rockwall Counties, Texas.

6. Plaintiff City of Irving is a duly incorporated home-rule municipality located in Dallas County, Texas.

7. Plaintiff City of Amarillo is a duly incorporated home-rule municipality located in Potter and Randall Counties, Texas.

8. Plaintiff City of Brownsville is a duly incorporated home-rule municipality located in Cameron County, Texas.

9. Plaintiff City of McKinney is a duly incorporated home-rule municipality located in Collin County, Texas.

10. Plaintiff City of Sugar Land is a duly incorporated home-rule municipality located in Fort Bend County, Texas.

11. Plaintiff City of Mission is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

12. Plaintiff City of Pharr is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

13. Plaintiff City of Coppell is a duly incorporated home-rule municipality located in Dallas and Denton Counties, Texas.

14. Plaintiff City of Duncanville is a duly incorporated home rule municipality located in Dallas County, Texas.

15. Plaintiff City of Weslaco is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

16. Plaintiff City of San Benito is a duly incorporated home-rule municipality located in Cameron County, Texas.

17. Plaintiff City of Alamo is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

18. Plaintiff City of Midlothian is a duly incorporated home-rule municipality located in Ellis County, Texas.

19. Plaintiff City of Highland Village is a duly incorporated home-rule municipality located in Denton County, Texas.

20. Plaintiff City of Seagoville is a duly incorporated home-rule municipality located in Dallas and Kaufman Counties, Texas.

21. Plaintiff City of Alton is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

22. Plaintiff City of Red Oak is a duly incorporated home-rule municipality located in Ellis County, Texas.

23. Plaintiff City of Boerne is a duly incorporated home-rule municipality located in Kendall County, Texas.

24. Plaintiff City of Roma is a duly incorporated home-rule municipality located in Starr County, Texas.

25. Plaintiff City of Rockport is a duly incorporated home-rule municipality located in Aransas County, Texas.

26. Plaintiff City of La Feria is a duly incorporated home-rule municipality located in Cameron County, Texas.

27. Plaintiff Town of Fairview is a duly incorporated home-rule municipality located in Collin County, Texas.

28. Plaintiff City of Lucas is a duly incorporated home-rule municipality located in Collin County, Texas.

29. Plaintiff City of Balcones Heights is a duly incorporated General Law Type A municipality located in Bexar County, Texas.

30. Plaintiff City of South Padre Island is a duly incorporated home-rule municipality located in Cameron County, Texas.

31. Plaintiff City of Olmos Park is a duly incorporated General Law Type A municipality located in Bexar County, Texas.

32. Plaintiff City of Escobares is a duly incorporated General Law Type A municipality located in Starr County, Texas.

33. Plaintiff Town of Westlake is a duly incorporated General Law Type A municipality located in Tarrant and Denton Counties, Texas.

34. Plaintiff City of Simonton is a duly incorporated General Law Type A municipality located in Fort Bend County, Texas.

35. Plaintiff Jim Darling is the Mayor of McAllen, Texas. He is a party to this proceeding in his official capacity as mayor and in his individual capacity as a citizen and taxpayer.

36. Defendant State of Texas has been served with process.

IV. JURISDICTION AND VENUE

37. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over this action pursuant to article V, section 8, of the Texas Constitution and section 24.007 of the Texas Government Code, as well as the Texas Uniform Declaratory Judgments Act. TEX. CIV. PRAC. & REM. CODE § 37.001, *et seq.*

38. This Court has jurisdiction over the parties because all Defendants reside or have their principal place of business in Texas.

39. Plaintiffs seek non-monetary relief.

40. Venue is proper in Travis County because Defendant has its principal office in Travis County. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(3).

V. FACTS

A. The Emergence of Small-Cell and Network-Node Technology

41. Senate Bill 1004, enacted by the 85th Legislature in 2017 and to become effective on September 1, 2017, enacts chapter 284 of the Texas Local Government Code. This new chapter purports to govern the deployment of network nodes in public rights-of-way.

42. A network node is defined in the bill as "equipment at a fixed location that enables wireless communications between user equipment and a communication network." A network node encompasses multiple pieces of equipment including a radio transceiver, an antenna, a battery-only backup power supply, and coaxial or fiber-optic cable. The term does not include a pole or tower to which the equipment is attached.

43. Network nodes are a component of small-cell technology, which in turn is part of the cellular network that supports smart phones, tablets, and other mobile devices.

44. Mobile data traffic, driven by increased sales of smart phones, tablets, and similar devices and by usage demanding greater bandwidth, results in significant growth in the use of mobile data networks and requires increased capacity.

45. Emerging technology will greatly accelerate the demand for increased capacity of wireless networks and for additional network nodes. While small cell technology will make possible greater uses of the internet, currently and in the foreseeable future the predominant use of the network is for streaming video.

46. Small-cell wireless networks using network nodes are a way to increase capacity and capabilities above that provided by the familiar cellular technology provided by larger cell towers, often referred to as macro sites. Rather than being located on tall macro towers, a small cell network node may be located on a street sign, on a light pole, on a traffic signal pole, on the side of a building, or on a dedicated pole.

47. Small cells complement the existing macro tower system by providing additional capacity and by increasing coverage in those areas where the signal from the macro tower is weak.

B. Legislative Involvement in Telecommunications Companies' Use of Municipal Right-of-Way

1. Earlier legislation is carefully crafted to avoid being a prohibited gift or grant

48. For many years telecommunications service was provided over land lines and was typically provided in a locality by a single provider. Texas municipalities would grant franchises to that company to permit it to use city rights-of-way. Typically, this would include the right to construct poles and string wire along the rights-of-way or to bury cable beneath the right-of-way. As the cities were giving the company a valuable property right, the company was required to pay for that right just as it would if it used an easement or other property right of a private landowner.

49. In 1999, in response to the emergence of competition among companies offering local exchange telephone service, the legislature enacted chapter 283 of the Local Government Code. That chapter was designed to encourage competition in the provision of telecommunications services and to ensure that new entrants were not precluded from gaining access to the use of municipal rights-of-way due to pre-existing franchise agreements. TEX. LOCAL GOV'T CODE, § 283.001(a).

50. Among other things, the statute set up a state system of determining the fees to be paid to a municipality for the use of rights-of-way by new entrants to the market place, but did so by basing the fee on the amount each city collected under its existing franchise fees. TEX. LOCAL GOV'T CODE, §§ 283.053, 283.055. In apparent recognition of the constitutional prohibition on a municipality making a gift or grant to a private corporation, the legislature designed the system to provide the cities with the fees they had previously negotiated or imposed while letting new entrants come into the market on the same basis as existing companies. Essentially, the city received and the new entrants were charged what had previously been established as fair-market value for the use of the city rights-of-way.

2. <u>SB 1004 is designed to transfer municipal property to private companies at a fraction of its fair market value</u>

51. In 2017, the legislature enacted SB 1004 (chapter 284 of the Texas Local Government Code), which became effective on September 1, 2017.

52. In SB 1004 the legislature seeks to encourage and simplify the use of network nodes and small-cell technology by limiting cities' regulatory powers over the placement and design of network nodes and by below-market fees for the use of the public rights-of-way.

53. The Texas legislation is part of a multi-state push by the wireless industry in conjunction with the American Legislative Exchange Council (ALEC) to achieve a more relaxed regulatory environment and to obtain a public subsidy.

54. In sharp contrast to the approach taken in chapter 283 of the Local Government Code, which was crafted to ensure that the fee for the use of public right-of-way was set at fair market value, SB 1004 (chapter 284) imposes maximum charges that are a small fraction of market value, thus, gratuitously, conveying public property to private corporations and providing a public subsidy for a private commercial enterprise.

55. SB 1004 (section 284.053) sets an annual maximum fee for the use of a city's right-of-way at $250 per network node. TEX. LOCAL GOV'T CODE, § 284.053.

56. By contrast, as reflected in the attached affidavit (Exhibit 1), the standard rate for the use of public right-of-way is between $1,500 and $2,500 per network node.

57. The fee schedule established by SB 1004 requires cities to permit use of their rights-of-way in return for only 10 to 16.7 percent of the fair market value of the property interest conveyed.

58. This amounts to a gift or grant to the companies maintaining the network of between $1,250 and $2,250 per node per year.

59. While significant numbers of small cell nodes are currently being installed, the number of cells is expected to increase by a factor of five or more as carriers convert to 5G technology.

60. At the time the SB 1004 fee structure was adopted, the legislature had before it the Legislative Budget Board fiscal note prepared for the House of Representatives noting that the bill could result in loss of right-of-way and similar fees to municipalities estimated at more than $800 million annually.

61. Nevertheless, the legislature passed the bill initiating a significant annual wealth transfer from Texas cities to private telecommunications companies of as much as hundreds of millions of dollars each year.

3. Earlier legislation is carefully crafted so that municipalities retain legislative powers relating to right-of-way management

62. Each Texas city is vested with "exclusive control over and under the public highways, streets, and alleys of the municipality." TEX. LOCAL GOV'T CODE, § 283. This exclusive authority of right-of-way management is consistent with, and an extension of, municipal land-use and zoning authority, which is exercised through a statutory framework that provides for public participation, due process, and oversight. TEX. LOCAL GOV'T CODE, Chapter 211.

63. Chapter 283 of the Local Government Code, which was designed to accommodate and integrate new entrants to the telecommunications system, expressly recognizes that the management of rights-of-way is a delegated legislative function that typically is vested in the municipalities of the state:

> It also declares that it is the policy of this state that municipalities:
>
> . . .. retain the authority to manage a public right-of-way within the municipality to ensure the health, safety, and welfare of the public . . .

TEX. LOCAL GOV'T CODE § 283.001 (b).

64. Consistent with this fundamental governmental policy, chapter 283 expressly provides that cities retain such powers in their consideration of applications for use of the right-of-way:

> A municipality may exercise those police power-based regulations in the management of a public right-of-way that apply to all persons within the municipality. A municipality may exercise police power-based regulations in the management of the activities of certificated telecommunications providers within a public right-of-way only to the extent that they are reasonably necessary to protect the health, safety, and welfare of the public.

TEX. LOCAL GOV'T CODE § 283.056 (c). And,

> In the exercise of its lawful regulatory authority, a municipality shall promptly process each valid and administratively complete application of a certificated telecommunications provider for any permit, license, or consent to excavate, set poles, locate lines, construct facilities, make repairs, affect traffic flow, *obtain zoning or subdivision regulation approvals, or for other similar approvals,* and shall make every reasonable effort to not delay or unduly burden that provider in the timely conduct of its business.

TEX. LOCAL GOV'T CODE. § 283.056(d) (emphasis added).

65. Chapter 283 treats the legislative function of right-of-way management and related permitting processes as necessarily entailing three interrelated aspects: (1) Safety of the structure to be placed within municipal right-of-way with respect to the construction required to install the structure and its operational safety, TEX. LOCAL GOV'T CODE. § 283.056; (2) Receipt of compensation for the use of right-of-way, TEX. LOCAL GOV'T CODE. § 283.051; and (3) Determining the suitability of sites for property in or along right-of-way in terms of the health, safety, and welfare of the public through proper land-use controls, TEX. LOCAL GOV'T CODE. § 283.056.

4. <u>SB 1004, in contrast to past legislative practice, is drafted to transfer municipal legislative authority over right-of-way management to private companies</u>

66. As with chapter 283 of the Texas Local Government Code, SB 1004 expressly recognizes that the management of right-of-way is a delegated legislative function concerning the health, safety, and welfare of the public that typically is vested in the municipalities of the state. TEX. LOCAL GOV'T CODE §§ 284.001(a)(2); (c)(2).

67. Like chapter 283, SB 1004 recognizes that the legislative function of right-of-way management and related permitting processes necessarily entails three interrelated aspects: (1) Safety of the structure to be placed within municipal right-of-way with respect to the construction required to install the structure and its operational safety, TEX. LOCAL GOV'T CODE §§ 284.102,

.108, .110, and 153; (2) Receipt of compensation for the use of right-of-way TEX. LOCAL GOV'T CODE §§ 284.053, .054[1]; and (3) Control over zoning and land use, TEX. LOCAL GOV'T CODE §§ 284.001(a)(2), .104, and .105.

68. In contrast with Chapter 283, however, which vests municipalities with authority to apply land-use controls as part of the permitting process. SB 1004, by contrast, vests decision-making authority with respect to land-use considerations with the wireless provider. In terms of promoting and preserving the health, safety and welfare of the public, a selection of a site for the placement of telecommunications equipment cannot be made properly without due consideration of the land-use aspects implicated in such site selection. Indeed, SB 1004 delineates certain land-use-related limitations on site selection, *i.e.,* relative proximity of parks and residential areas, and location within historic or design districts. TEX. LOCAL GOV'T CODE §§ 284.104, .105. Beyond that, however, SB 1004 vests ultimate responsibility for the adequate consideration of the public health, safety, and welfare implications of site selection with the telecommunications providers rather than with the municipalities. The providers select their desired sites, and the application review for those sites cannot include municipal-zoning review or land-use approvals. TEX. LOCAL GOV'T CODE §§ 284.101(a).

69. In a word, SB 1004 expressly takes the public right and obligation to manage right-of-way with adequate consideration of zoning and land-use needs from the municipality, and vests such decision making with telecommunications providers, whose applications must be approved without analysis of land-use matters from a public perspective. TEX. LOCAL GOV'T CODE §§ 284.101(a).

[1] As discussed elsewhere, *see e.g.* ¶¶ 73, 82, *infra*, the chapter 283 system of market-based compensation is replaced in chapter 284 with a system of merely token compensation.

70. Accordingly, SB 1004 represents an overly broad delegation of legislative authority to private entities, in violation of article II, section 1, and article III, section 1, of the Texas Constitution.

C. Constitutional Framework

1. Prohibition against gifts to private corporations

71. In the period following the Civil War many Texas cities gave financial aid to railroads in order to entice the railroad to come through their community and thus to provide those cities with a commercial advantage. The railroads were not always constructed, and, even if they were, the anticipated advantages to the cities did not always materialize. In response to this situation, and to prevent its reoccurrence, the framers of the 1876 Constitution included article XI, section 3, which provides, in part:

> No county, city, or other municipal corporation shall hereafter . . . make any appropriation or donation to [any private corporation or association] . . ..

TEX. CONST., art. XI, § 3.

72. Additionally, the framers of the 1876 Constitution adopted article III, section 52, which prohibited the legislature from approving legislation such as SB 1004 that would authorize or direct a city to make a gift or grant to a corporation. That section provides in part:

> (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, ...
>
> TEX. CONST., art. III, § 52.

73. SB 1004 not only authorizes cities to make a prohibited grant of a thing of value to a private corporation, it requires it. Specifically, the legislation requires cities to permit network providers to use public rights-of-way to locate network nodes, TEX. LOC. GOV'T CODE, § 284.151

(except as permitted by chapter 284, a city may not prohibit, regulate, or charge for the installation or location of network nodes in a public right-of-way and may not institute a moratorium on permitting such nodes), and it limits payment to the city for the use of those rights-of-way to an annual rate of not more than $250 per node when the negotiated market rate ranges from $1,500 to $2,500. In other words, SB 1004 requires Texas cities to permit private corporations to use the public right-of-way for a steeply discounted price between one-tenth and one-sixth of its actual value. This is a grant of public money or thing of value prohibited by article III, section 52. Similarly, it is a prohibited donation under article XI, section 3. This amounts to a massive, multi-million-dollar gift to private corporations from the cities of Texas. With the advent of 5G technology and the increased demand for more small cells, the size of the gift may amount to hundreds of millions of dollars. And the gift continues year after year.

74. While cities are prohibited from making a gift to a private corporation, the constitution does not prohibit purchases of goods or services where the payment to or from the government is based on the value received. For example, cities purchase all types of goods (*e.g.*, automobiles, street paving material, office supplies, etc.) from vendors at market-value prices.

75. There are instances, though, where the transaction between the government and private enterprise does not clearly fit the standard mode of a purchase at a price that is recognized as reflecting value received. For those instances, Texas law has developed to recognize that some public benefits to private corporations are constitutionally permitted if they serve a legitimate public purpose and provide a clear public benefit in return. *E.g.*, *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Comm'n,* 74 S.W.3d 377, 383 (Tex. 2002) (*"TML"*). "A three-part test determines if a statute accomplishes a public purpose consistent with [article III,] section 52(a)." *Id.* at 384. "Specifically, the Legislature must: (1) ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties;

(2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment, and (3) ensure that the political subdivision receives a return benefit." *Id.*

76. SB 1004 does not meet the three-part test that might avoid the constitutional prohibition of article III, section 52. Failure to satisfy any one of the three parts of the test is fatal.

77. SB 1004 does not meet the first prong of the three-part test, which requires that the *predominant* purpose is to accomplish a public purpose rather than to benefit private parties. Section 284.001, enacted by SB 1004, does contain findings that network nodes are instrumental to increasing access to advanced technology and information and that expeditious processes and reasonable terms and conditions for access to the public right-of-way further the interest in having a reliable wireless network. TEX. LOC. GOV'T CODE, § 284.001(1) and (5). While carriers undoubtedly would like to have a statutorily imposed rental rate that is far below fair-market value, there is no legislative finding or evidence that carriers have been prevented from creating their wireless networks by the free-market economy. Indeed, carriers have been installing thousands of cells in cities at the upper end of market rates, which makes it difficult to contend that the necessity of paying fair value is a barrier to the development of the networks. Unless the existing system operates as a barrier, the "predominant" effect, and presumably the purpose, of the establishment of a far-below-fair-market-value is to benefit the private corporations, not the public.

78. Further, while the public right-of-way is a convenient location for network nodes, nodes can generally be placed on private property such as the side of a building located immediately adjacent to the right-of-way. Making a gift of the use of the public right-of-way frees network providers from the operation of the free market and deprives the private property owners of the opportunity to rent space to host network nodes. This public subsidy undermines the free

market system and deprives the private landowners of the value of their property, which is not consistent with public policy.

79. The predominant purpose of SB 1004 is to benefit private parties, not to convey a public benefit. Thus, the statute does not meet the first prong of the three-part *TML* test.

80. SB 1004 also does not meet the second prong of the three-part test, which requires that the local government retain control to ensure that the public purpose is accomplished. While the statute directs maximum rates for use of the public right-of-way and specific deadlines for permitting decisions, all of which benefits the network carriers, there is nothing in the statute to mandate continued oversight to ensure that the public purpose is accomplished. The statute provides great detail on the cities' obligations to the wireless providers, but there is nothing in the Act that provides for the cities' or the state's continued oversight of the carriers' actions to ensure that they act for the public's benefit. Even if we are to assume that development of the wireless system is the predominant purpose and represents the benefit to the public, there is nothing in the Act to establish measurable benchmarks for the development of the system, nothing to ensure that underserved areas rather than simply the most profitable areas are served, nothing to ensure that the publicly subsidized nodes are available for the public rather than, in some cases, perhaps being reserved for private users, or anything else to ensure that public purpose is accomplished. In the absence of such statutorily provided oversight, the statute does not satisfy the Supreme Court's test.

81. The third part of the test is to ensure that the political subdivision receives a return benefit. This is often phrased as ensuring that there is adequate consideration. Here, the cities are limited to roughly ten to sixteen percent of market value with no additional benefit to compensate for the lost revenue.

82. SB 1004 finds that the rates imposed by the statute are "fair and reasonable" and in compliance with federal law (47 U.S.C. § 253) that prohibits rates that have the effect of prohibiting the ability of any entity to provide telecommunications service. The SB 1004 rates, though, are not only well below the rates that would be charged in a free market environment, they are also a fraction of the rates the state is free to charge for the same services. The legislature was careful to require cities to provide a major subsidy to these private enterprises, while, at the same time, leaving the state free to charge market rates for the use of its rights-of-way. Presumably, if it is fair and reasonable for the state to charge market rates, it is difficult to understand how limiting cities to a small fraction of those rates can also meet the standard of fairness and reasonableness.

83. SB 1004, so long as it is not enjoined and not declared to be unconstitutional, directs city officials, such as Mayor Darling, to give away city resources and, by doing so, to violate article XI, section 3, of the Texas Constitution.

84. Similarly, until SB 1004 is enjoined and declared to be unconstitutional, city taxpayers, such as Jim Darling, in his individual capacity, are injured by the city's gift of public resources to private corporations. Even if the statute is subsequently declared to be invalid, the cities, their officials, and their taxpayers are irreparably injured. The opportunity to negotiate a market rate prior to the installation of any nodes is lost. Further, even if it is possible to recover the difference between the ultimately determined rental rate and the $250 per node authorized by SB 1004, the recovery will likely be in a subsequent fiscal year so that the opportunity to have an immediate favorable impact on the city's finances and on its taxpayers in current fiscal years is lost.

85. SB 1004 by mandating that cities make a gratuitous grant of its property to a private business enterprise violates the Texas Constitution, and, under Texas law, a violation of

constitutionally guaranteed rights inflicts irreparable injury warranting injunctive as well as declaratory relief.

2. Prohibition against certain delegations of legislative power to private corporations

86. In establishing the government of the state, the people delegated the powers of the government to the legislative, executive, and judicial departments:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted

Tex. Const. art. II, § 1.

87. The Legislature is authorized to delegate legislative powers to local governments, administrative agencies, and private entities. As Texas courts have recognized, delegations of legislative power can be both necessary and proper in certain circumstances, such as, for example, with the delegation of power to private entities to promulgate certain industrial and professional standards.

88. By the same token, Texas courts have also recognized that delegations to private entities raise more troubling issues than do delegations to public bodies and that they are therefore subject to more stringent requirements and less judicial deference than public delegations. As the Supreme Court has stated:

> [P]rivate delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.

Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997).

89. Texas courts have developed a balancing test containing eight factors to determine whether a particular delegation of legislative power to a private delegate is constitutional. These factors are stated as follows:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?

2. Are the persons affected by the private delegate's actions adequately represented in the decision making process?

3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?

4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?

5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?

6. Is the delegation narrow in duration, extent, and subject matter?

7. Does the private delegate possess special qualifications or training for the task delegated to it?

8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

Texas Boll Weevil Eradication Found. 952 S.W.2d at 472.

90. SB 1004 vests the legislative power of zoning and land use as it applies to right-of-way management with private parties. When considered through the lens of the eight-part balancing test, it is abundantly clear that the delegation to private entities of the legislative

authority to manage the right-of-way by making land-use decisions that typically require application of the processes set out in Local Government Code chapter 211, violates article II, section 1, and article III, section 1, of the Texas Constitution.

91. Specifically, with respect to the zoning and land-use aspects of right-of-way management:

(a) The actions of the telecommunications providers, as private delegates of legislative authority, are not subject to meaningful review by a state agency or other branch of government;

(b) The members of the public that will be most affected by the private delegates' actions are not adequately represented in the decision-making process;

(c) The private delegate is applying the law to its individual, pecuniary interest rather than making rules of general application;

(d) The private delegates have a pecuniary or other personal interest that may conflict with their public functions;

(e) The delegation is not narrow in duration, extent, or subject matter;

(f) The private delegates do not possess special qualifications or training in municipal land planning or right-of-way management; and

(g) The legislature has not provided sufficient standards to guide the private delegate in its work.

92. SB 1004, so long as it is not enjoined and not declared to be unconstitutional directs city officials, such as Mayor Darling, to relinquish properly delegated municipal authority to manage the right-of-way for the health, safety, and welfare of the public to private delegates whose pecuniary interests most likely will conflict with the public's interests, and who do not have the expertise to manage public right-of-way for the benefit of the public. As such, SB 1004 directs city

officials, such as Mayor Darling, to violate their obligations to promote and preserve the safety of the public under their respective city charters, chapter 211 of the Texas Local Government Code, and chapter 311 of the Texas Transportation Code, and, by doing so, affirmatively participate in the violation of article II, section 1, and article III, section 1 of the Texas Constitution.

93. SB 1004 by mandating that municipalities cede their properly delegated authorities that are necessary for right-of-way management in the interest of public health, safety, and welfare of the public violates the Texas Constitution, and under Texas law, is a violation of constitutionally guaranteed rights that inflicts irreparable injury warranting injunctive relief.

VI. CAUSES OF ACTION

94. Paragraphs 1-93 are incorporated by reference as though fully restated in support of each of the following causes of action.

A. Declaratory Judgment – SB 1004 Violates the Texas Constitution

95. The Uniform Declaratory Judgments Act ("UDJA") is remedial, and intended to settle and afford relief from uncertainty and insecurity with respect to rights under a statute, and must be liberally construed to achieve that purpose.

96. The UDJA waives the sovereign immunity of the state and its officials in actions that challenge the constitutionality of a statute and that seek only equitable relief.

97. Pursuant to the UDJA, Plaintiffs request a declaratory judgment of the Court, as follows:

a. That SB 1004, in its requirement set out in section 284.053 of the Texas Local Government Code that cities permit private corporations to use the public rights-of-way at significantly below market value rates, impermissibly authorizes and requires cities to make a gift or grant in violation of article III, section 52(a), of the Texas Constitution;

b. Cities complying with the statutory direction will violate article XI, section 3, of the Texas Constitution as they will be making a prohibited donation to a

private corporation;

c. Section 284.053 of the Texas Local Government Code is unconstitutional and unenforceable;

d. SB 1004, in delegating legislative powers of managing right-of-way through proper zoning and land-use controls to private corporations such that the corporations are entitled to make land-use decisions without meaningful guidance, public process, or oversight is an impermissible delegation of legislative power in violation of article II, section 1, and article III, section 1, of the Texas Constitution;

e. Cities complying with the statutory direction violate article II, section 1, and article III, section 1, of the Texas Constitution as they will be affirmatively participating in an unconstitutional delegation of municipal legislative authority.

f. Sections 248.101(a) and 248.154(c) are unconstitutional and unenforceable.

B. Injunction

98. For the reasons set forth in paragraphs 1-93, SB 1004 violates the state constitution.

99. Plaintiffs are entitled to a temporary injunction enjoining enforcement of section 284.053 of the Texas Local Government Code pending a decision on a permanent injunction and declaratory judgment. Section 284.053 is invalid as being enacted in contravention to the express denial of authority to the legislature to permit or require cities to make gifts or grants to private corporations. Accordingly, the statute is void. The state, by enacting SB 1004 and subjecting plaintiffs to its requirements, is directing plaintiffs to violate the Texas Constitution. The forced transfer of property pursuant to an unconstitutional statute is subject to being enjoined without regard to whether there is a legal remedy. Being subjected to, and forced to administer, an unconstitutional statute is necessarily and of itself an irreparable injury. Further, there is irreparable injury to the cities and their citizens, which potentially face the grossly inadequately compensated use of their property prior to having an opportunity for a merits decision on the constitutionality

of the statute. Plaintiffs are therefore entitled to a temporary and ultimately to a permanent injunction against enforcement of the unconstitutional statute.

100. Plaintiffs are entitled to a temporary injunction enjoining enforcement of sections 248.101(a) and 248.154(c) of the Texas Local Government Code pending a decision on a permanent injunction and declaratory judgment. Sections 248.101(a) and 248.154(c) are invalid as being enacted in contravention to the denial of authority to the legislature to make delegations of legislative authority to private actors such that the private delegates are neither constrained before they act by meaningful standards nor made accountable after they act by administrative, judicial, or popular review. Accordingly, the statute is void. The state, by enacting SB 1004 and subjecting plaintiffs to its requirements, is directing plaintiffs to violate the Texas Constitution. The improper delegation of legislative authority pursuant to an unconstitutional statute is subject to being enjoined without regard to whether there is a legal remedy. Being subjected to, and forced to administer, an unconstitutional statute is necessarily and of itself an irreparable injury. Further, there is irreparable injury to the cities and their citizens, which potentially face the substantial and detrimental consequences of the implementation of land-use decisions in public right-of-way which are made by actors who have pecuniary interests that often most likely will conflict with the promotion of the health, safety, and welfare of the public, and which will not be made by persons or entities with specialized knowledge of public right-of-way management, and which will not be subject to meaningful review. Plaintiffs are therefore entitled to a temporary and ultimately to a permanent injunction against enforcement of the unconstitutional statute.

101. Any injunction will be against the state, which has no pecuniary interest in the suit and can show no monetary damages. Additionally, at least seventeen of the plaintiffs are home rule cities whose charters exempt them from bond requirements in injunction suits. Accordingly, no bond or a nominal bond would be appropriate under Rule 684.

102. Plaintiffs ask the court to set its request for a temporary injunction for an expedited hearing and set its request for permanent injunction for an expedited full trial on the merits and, after said trial, issue a declaratory judgment and a permanent injunction and barring the enforcement of Sections 284.053, 248.101(a), and 248.154(c) of the Local Government Code.

VII. CONDITIONS PRECEDENT

103. All conditions precedent have been performed or have occurred.

VIII. ATTORNEY'S FEES

104. As a result of the actions complained of herein, Plaintiffs have had to engage qualified counsel to prosecute this action and has incurred, and will continue to incur, reasonable and necessary attorney's fees. Plaintiffs are therefore entitled to recover these fees pursuant to Chapters 37, of the Texas Civil Practice and Remedies Code.

IX. REQUEST FOR DISCLOSURES

105. Pursuant to Texas Rule of Civil Procedure 194.2, Plaintiffs hereby request that Defendants make the disclosures identified in Tex. R. Civ. P. 194.2(a-i) and (l) within fifty (50) days of the service of this Petition.

PRAYER

FOR THESE REASONS, Plaintiffs request that Defendants be cited to appear and answer and, on final trial that Plaintiffs have judgment against Defendants for:

1. The declaratory relief requested herein;
2. A temporary and permanent injunction;
3. Attorney's fees;
4. Litigation costs;
5. Such other and further relief, at law and in equity, to which the Plaintiffs may show themselves entitled.

Respectfully submitted,

By: */s/ C. Robert Heath*

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in His Individual Capacity

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served via electronic filing service provider and via email to all parties of record on this the 14th day of November, 2017.

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ATTORNEYS FOR DEFENDANT

/s/ C. Robert Heath
C. ROBERT HEATH

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, a Notary Public for the State of Texas, personally appeared C. Robert Heath, who after identifying himself and being duly sworn by me deposed and said that he has read the foregoing and that the facts stated are based on personal knowledge and are true and correct.

C. Robert Heath

SWORN TO AND SUBSCRIBED BEFORE ME on this 14th day of November, 2017.

Rebecca Ann Vragel
Notary Public, State of Texas

REBECCA ANN VRAGEL
MY COMMISSION EXPIRES
JUNE 7, 2021
NOTARY ID: 8326019

EXHIBIT 1

AFFIDAVIT

State of New York)

County of ONADAGA)

The undersigned affiant, Ken Schmidt, being first duly sworn, hereby deposes and says:

1. My name is Ken Schmidt. I reside in the Syracuse, New York, area. I am over the age of eighteen and capable of making this affidavit. The statements in this affidavit are true and correct and within my personal knowledge. To the extent they reflect expert opinion, they are based on facts or data that I have been made aware of, reviewed, or personally observed and reflect facts and data that would reasonably be relied on by experts in the field.
2. Attached as Exhibit A to this affidavit is a true and correct copy of my professional resume that reflects my educational and professional background. To briefly summarize material in the resume, I have worked in the wireless industry for twenty years. From 1997- 2004, I worked at a small tower company, and then provided site acquisition services to wireless companies. In 2004, I started Steel in the Air, Inc. which provides wireless-infrastructure-lease-related services to landowners and small-tower owners across the United States. I am the president and owner of that company. Since 2004, we have advised over 3,500 landowners, including cities, corporations, and individuals, regarding valuation questions related to wireless-infrastructure leases. We have collected lease-rate data on approximately 10,000 wireless leases which include all types of leases in every state in the United States. Steel in the Air and I have been recognized as experts in the field of lease valuation by our peers, in national and local publications, and by courts of law. I am also a Partner in SteelTree Partners, LLC and have provided valuation services and sell-side

advisory service to many clients regarding over $1.5 billion dollars of communication infrastructure assets.

3. Nearly 20 years ago, I started collecting publicly and privately available tower location and lease data. When I formed Steel in the Air, I believed that strong data was paramount to our being able to advise landowners and tower owners effectively. Over that timeframe, we have collected lease data through news stories, public records requests, industry sources, and client-provided information. We maintain one of the most comprehensive wireless infrastructure databases in the United States which is not owned by a wireless company or tower company.
4. Specifically related to small-cell and Distributed-Antenna-System (DAS) leases, my company has conducted hundreds of hours of research regarding small cell and DAS-node lease agreements including making public records requests to various public entities over the last three years.
5. Earlier this year, I testified as an expert before the Florida Legislature on behalf of the Florida League of Cities and the Florida Association of Counties regarding similar small-cell legislation in Florida. In part through the Florida engagement I became aware of the effort by the industry, led by the Wireless Infrastructure Association in conjunction with the American Legislative Exchange Council (ALEC) to enact legislation in multiple states to provide relatively consistent procedures and fee structures for obtaining the use of public rights-of-way and to require local governments to permit use of their rights-of-way at far-below-market rates.
6. In preparation for making this affidavit, I have reviewed SB 1004, which enacted chapter 284 of the Texas Local Government Code.

7. Section 284.053 of the Texas Local Government Code sets a maximum annual rental rate of $250 per network node located in a city's right-of-way. The term "network node" is defined so that it includes both small cells and DAS but does not include macrocells or cell towers.

8. A macrocell is what most people think of when considering cellular antennas and cell service. Multiple macrocells may be placed on a single structure such as a cell tower. Cell towers are typically 50' or taller towers containing multiple antennas that have been used to provide cell phone service for more than two decades. Small cells, conversely, as their name suggests, are much smaller in size and coverage area than a macrocell or a cell macro tower, will become much more numerous, and can often be found on poles used for street lights, traffic lights, street signs, and poles of similar height. A small cell typically is utilized exclusively by one wireless company, while a distributed-antenna system or DAS can receive and transmit signals from multiple wireless service providers. As noted above, both small cells and DAS are included in the statute's definition of network node.

9. To determine a fair market value for the use of municipal right-of-way by a wireless provider to locate a small-cell or DAS network node, I looked at data from 50 cities in 25 states. The pole attachment fees went from $200 to as high as $13,200 per year. In Texas, the rates ranged from $1,000 to $2,400 per year.

10. I tried to make an apples-to-apples comparison by using rates for attachment to an existing pole. For example, in Houston, the Master License Agreement for Wireless Facilities and Poles in the Right-of-Way provides a 2016 annual per pole fee of $2,700 if the licensee will be placing its own pole in the right-of-way and $2,000 if it is attaching to an existing utility pole. For Houston, I used the lower $2,000 fee for attaching to an existing pole.

Similarly, in determining average fees, I looked solely at the fees on a city-by-city basis rather than weighting the fees by the number of cells in each city. Larger cities tend to be on the higher end of the annual rental rates and generally have the highest number of node locations. If I had weighted the average by the number of locations, the average would have been higher.

11. I determined that the average annual per pole rate in the 50 cites in our small cell/DAS data base is $2,388 per pole per year.
12. The average rate for the six cities in Texas in the data base is $1,733 per pole per year.
13. Looking at the complete sample and discarding the extremes on both the high and low end, it is my opinion that fair market value for attaching a network node to a pole in a municipal right-of-way will fall within the range of $1,500 to $2,500.
14. The $250/year rate for pole attachments is substantially below fair market value. It is 10.4% of the average rate that was negotiated at arm's length between U.S. cities and counties and wireless service providers in our data, and 14% of the average of Texas public cities.
15. If one considers the $1,500-$2,500 range for fair market value, the $250 rate represents one-tenth to one-sixth of fair market value or 10% to 16.7% of fair market value.
16. Because of the statute's requirement that Texas cities make city-owned poles in their rights-of-way available to the network providers at a rate that is substantially below fair market value, there will be an obvious negative impact on municipal finances. It will also have an impact on other entities.
17. The reduced rental rate for network nodes on poles in municipal rights-of-way would have a negative effect on the ability of private property owners to rent space for small cells and

DAS. These nodes can be and would likely be located on building roofs, the sides of buildings and similar outdoor locations. In my experience, private small cell leases between property owners and wireless companies traditionally range from $4,200 per year to $8,400 per year. By establishing such a low and far-below market rate for small cell leases in the public right-of-way, Texas will largely eliminate the use of private property for small cells. In my experience, very few, if any, private property owners would be willing to lease their property to wireless service providers for rates anywhere near $250/year. Thus, by subsidizing the wireless service providers on public right-of-way, private landowners as a whole in Texas will see significantly less interest for small cells on their land or buildings and as a result, will realize measurably less income.

18. An effect of the requirement that Texas municipalities permit the use of poles within their rights-of-way at extremely low rental rates is likely to be that the residents of Texas cities will be subsidizing the wireless rates paid by consumers in other states that do not have artificial barriers to what can be charged wireless providers. Specifically, the large wireless companies—*e.g.*, AT&T, Sprint, T-Mobile, and Verizon—do not charge geographically based rates. Rates are consistent throughout the United States regardless of what may be higher underlying costs of operating a network in other areas. By setting low rates in Texas that are as much as five or more times lower than what municipalities in other states without similar legislation charge, Texas consumers are fundamentally subsidizing service for customers in other states. Alternatively, Texas cities are subsidizing wireless service provider profits in an already very profitable industry.

19. While the ability to use poles within the public right-of-way at a statutorily set rate that is far below fair market value undoubtedly benefits the wireless service providers, it is

unlikely that the absence of a rate cap on the use of the right-of-way would materially prevent or slow down the expansion of the wireless network. Wireless providers are expanding the small cell network not just because they hope to offer advanced services, but to reduce their operating costs and to increase capacity for more profitable services like consumer video. Additionally, the cost of the use of the right-of-way is minuscule when considered in the context of the revenue currently generated by the network. The wireless industry in 2016 generated $188 billion in service revenue according to industry trade organization CTIA's 2016 Wireless Industry Survey. Paying fair market value for small cell infrastructure rights would not create a barrier to entry. Assuming $2,000 per year per pole and 100,000 poles in the State of Texas, the "burden" on the wireless industry would be $200 million per year, or one-tenth of one percent of the wireless industry's combined service revenue. This assumes that the wireless industry would not be capable of generating additional service revenue from deployment of this infrastructure, which is clearly not the case as demonstrated by numerous comments to the contrary during nearly every wireless company quarterly earnings call. To the contrary, there is every reason to believe that the wireless providers would still generate positive net revenue by paying the level of right-of-way rental rates they were paying before SB 1004. Wireless service providers have deployed over 2,000 small cells in New York City despite New York having rates that are above average at $3,000 per pole. Even at $2,000 per pole, the City of Houston still received 700 plus applications for small cells in 2016. There is no reason to believe that paying market rates for the use of public property of Texas cities will delay or hinder the development of the wireless network.

20. SB 1004 does not provide for cities or the state to have continuing control over the use of the subsidized nodes placed in the municipal right-of-way to ensure that the public is being served as such service is contemplated in the lengthy preamble of the legislation. For example, there is nothing in the Act to preclude dedicating some nodes to purely private use by individual customers rather than being available to the public. Similarly, there is nothing to give cities the ability to see that the subsidies to the network are used to bring "reliable wireless networks and services" to areas of greatest public need such as traditionally underserved areas. There is no assurance that the public will be provided cost effective access to "next-generation services" or that the wireless service providers won't deploy small cells solely to maintain more favorable cost structures for existing generation services. There is no methodology for either the state or cities to ensure that the wireless service providers will deploy infrastructure that will "help ensure that this state remains competitive in the global economy." Furthermore, there is no ability to confirm over time that the nodes were deployed in a method that "protect and safeguards the health, safety, and welfare of the public". As written, SB 1004 has almost no checks and balances necessary to assure that wireless service providers don't simply install network nodes where it is most economically advantageous to them while ignoring the areas where it would be most beneficial to serve the public or that would further Texas' stated policy objectives in passing this legislation.

Signed this the 22 day of AUGUST, 2017.

KEN SCHMIDT

Sworn to before me this 22 day of August, 2017.

MARCY J KLIPPEL
Notary Public - State of New York
NO. 01KL6138338
Qualified in Onondaga County
My Commission Expires Dec 19, 2017

Notary Public

My Commission expires:

EXHIBIT A

Ken Schmidt

16001 Waterleaf Lane, Ft. Myers, FL 33908 Phone: (813) 335-4766
Email: ken@steelintheair.com

PROFESSIONAL EXPERIENCE:

Steel in the Air, Inc.

Fort Myers, FL 01/2004 - Current

President/Owner

- Started Cell Tower Consulting Firm specialized in due diligence, cell tower tenant and ground lease negotiations
- Provided fair market value analysis for cell site leases for over 2,700 clients nationwide in the course of 10 years
- Created online Competitive Analysis GIS mapping service for clients to use in evaluation of potential tower sites and acquisition of cell towers and or ground leases
- Established nationwide database of 250,000 cell site locations and 8,500 cell site leases
- Enlisted to provide due diligence and competitive analysis services by multiple tower companies including projections of potential lease up and document review
- Provide sale side advisory services as a partner in SteelTree Partners for the sale of over $800,000,000 in tower assets over 10 years
- Retained regularly by Investment Analysts to review and analyze the public tower companies and the current state of the market
- Formulated process for initial evaluation of any tower site in the US to determine its uniqueness/value as a wireless communication facility

Cell Tower Attorney

New York, NY and Fort Myers, FL 01/2007 - Current

Partner

- Started Cell Tower Law Firm specialized in cell tower lease related legal issues.
- Provided legal guidance on cell site lease related issues for over 500 clients nationwide in the course of 6 years

Horizon Site Services, Inc.

Tampa, FL 01/2000 to 01/2004

General Manager (01/2001)

- Responsible for coordinating of due diligence, database accuracy, and general business development for due diligence, site acquisition, and zoning projects
- Developed proprietary GIS (Geographical Information Systems) database of communications towers and established a clientele of tower companies and wireless carriers for custom mapping applications and lease up analysis
- Performed Project Management of site acquisition and zoning for 300 site build for Nextel in Atlanta, Georgia
- Established and maintained of positive working relationship with clients & contractors.

Site Acquisition and Zoning Manager (01/2000)

- Performed Project Management of site acquisition and zoning for 100 site build for Voicestream Wireless in St. Louis, Missouri
- Managed field agents to accomplish the required tasks including preliminary site drives, zoning analysis, construction caravans, leasing and final zoning through permit

Ken Schmidt

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Imperial Tower Leasing, Inc.

Tampa, FL 06/2000-01/2003

General Manager/Part Owner

- Performed project management for all development activities related to the identification and development of potential communication towers including identifying corridors for suitable for speculative development, RF design, search ring creation, site acquisition and zoning
- Formulated Process for determining lease-up potential of prospective build sites
- Negotiated development deal for communication towers with large private tower company

Broadcast Tower Leasing, Inc.

Tampa, FL 01/1998 to 01/1999

General Manager

- Developed and executed strategic plan for identification and development of community broadcast towers across the US
- Managed engineering, marketing, and all phases of site development for community broadcast facilities
- Established strategic relationships and joint marketing agreements with national vendors and key consultants for development of towers up to 2000' tall
- Created forecast models for all broadcast tower opportunities including lease-up estimates and cost projections
- Managed all external contractors and marketing agents
- Recruited, interviewed, hired and trained personnel.

Acme Towers, Inc.

Tampa, FL 01/1997 to 01/1998

Site Acquisition Manager

- Managed site acquisition and zoning for Central Florida
- Zoned 15 difficult sites in central Florida
- Developed and maintained client relationships.

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EDUCATION & CERTIFICATIONS:

University of Florida School of Law
Gainesville, FL

- Juris Doctorate 1996
  Concentration in Construction Law and Bankruptcy

Northeast Missouri State University
Kirksville, MO

- Bachelor of Science- Political Science 1992
  Minor in Business Law

Ken Schmidt

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INDUSTRY HONORS:

- Spoke at the Tower Summit (Industry Conference) twice- "*Broadcast Tower Opportunities*" and "*Cell Tower Due Diligence*"
- Spoke at 2005 Georgia Association of Assessing Officials Annual Conference – "*Cell Tower Valuation and Assessment*"
- Spoke at 2006 Association of University Real Estate Officials- "*State of the Wireless Industry*"
- Spoke at 2007 Arkansas Appraisers Association Annual Conference- *"Cell Tower Valuation and Assessment"*
- Spoke at 2008 Inside Self Storage Association Conference on "*Cell Site Leases for Self Storage: Long-Term, Reliable Income Opportunities"*
- Spoke at 2009 International Association of Assessing Officials Annual Conference on "*Assessing the Value of Cell Towers*"
- Spoke at 2013 US Navy Appraisers' Annual Appraisal Conference on "*Appraisal of Cell Towers*"
- Retained as Expert Witness in Multiple Cases Involving Cell Tower Valuation and Lease Forecasting Litigation
- Regularly Quoted as Cell Tower Expert in Numerous Newspaper Articles including in the *Wall Street Journal*, *New York Times* and in Industry Trade Magazines including *RCR News and AGL Magazine*

COMPUTER SKILLS:

- Microsoft Office 2013- Powerpoint, Excel, Access, Word, Outlook, CRM Dynamics
- MapInfo, ArcInfo- Geographical Information Systems (Mapping Programs)
- Google Earth, Bing Mapping
- All Delorme Mapping Products